THE ATTORNEY GENERAL'S COMMITTEE
ON ADMINISTRATIVE PROCEDURE

DEPARTMENT OF JUSTICE
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FEDERAL POWER COMMISSION

PRELIMINARY RESEARCH REPORT
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THE FEDERAL POWER COMMISSION

History of Federal Power Regulation

In 1882 the first hydroelectric power project in the United States was constructed. Eight years later Congress took its first step toward power regulation by providing in the Rivers and Harbors Act[1] that no obstruction should be built in any navigable waterway without Congressional consent. The policy of fostering water power development was first articulated six years later when Congress authorized the Secretary of the Interior to permit citizens and associations of citizens to use tracts of not more than forty acres and rights of way up to twenty-five feet in width on the public lands and national forests for the generation and transmission of electric power.[2]

The Rivers and Harbors Act of 1899[3] modified the Act of 1890 by requiring the approval of the Chief of Engineers and the Secretary of War in addition to legislative authorization, and by providing for the consent of the state legislature as a substitute for Congressional action when the navigable portions of the waterway involved lay entirely

1. Approved September 19, 1890, 26 Stat. 455.
2. Act approved May 14, 1896, 29 Stat. 120, 43 U.S.C. 957.
3. Approved March 3, 1899, 30 Stat. 1151, 33 U.S.C. 401 ff.

within one state. In 1905 the Forest Service was transferred to the Department of Agriculture and the powers of the Secretary of the Interior over the national forests devolved upon the Secretary of Agriculture.[4] In 1906 the General Dam Act[5] was enacted. It prescribed general conditions forming a part of all authorizations to build dams. In 1910[6] for the first time Congress imposed a limit upon the duration of permits to build dams and fixed the period at fifty years. At the same time Congress provided for the imposition of charges against licensees to defray the expenses incurred by the Government in the administration of the statute. Both of these provisions are embodied in the law in force today.

In 1920 the Federal Power Commission was created by the Federal Water Power Act.[7] The Commission was composed of the Secretaries of War, Agriculture, and the Interior, and was authorized to license and supervise water power development on the public lands, navigable streams, and other waters affecting interstate or foreign commerce. In 1921 it was deprived of power to license projects in national parks and monuments,[8] but otherwise its powers and organization remained

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4. Act approved February 1, 1905, 33 Stat. 628, 16 U.S.C. 472.
5. Approved June 21, 1906, 34 Stat. 386.
6. Act approved June 23, 1910, 36 Stat. 593.
7. Approved June 10, 1920, 41 Stat. 1063.
8. Act approved March 3, 1921, 41 Stat. 1353.

undisturbed until 1930. During these ten years the Commission had only one employee of its own, an executive secretary, and was forced to rely upon the employees of the Departments headed by the Commission members for the performance of its functions. This method of operation was distinctly inadequate and Congress finally reorganized the Commission as an independent agency with its own staff of employees, but left its powers unchanged.[9] The reorganization Act provided for a Commission of five full-time members, appointed by the President with the advice and consent of the Senate, which should supersede the existing commission and commence to function as soon as three members had taken office. The new Commission entered upon its duties in December 1930.

In 1935 the Federal Water Power Act with minor changes was made Part I of the Federal Power Act by Title II of the Public Utility Act of 1935 and Parts II and III were added.[10]

Part II greatly extended the field of federal regulation by giving the Commission jurisdiction over utilities which own facilities used for the transmission or sale at wholesale of electric energy in interstate commerce. Part III relates to both those utilities and licensees under Part I and contains the administrative and procedural provisions of the Federal Power Act.

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9. Act approved June 23, 1930, 46 Stat. 797.

10. Approved August 26, 1935, 49 Stat. 803.

In 1938 the powers of the Commission were extended to interstate and foreign commerce in natural gas by the Natural Gas Act.[11]

Various other powers were conferred upon the Commission by the Tennessee Valley Authority Act[12] as amended, the Bonneville Act,[13] The Fort Peck Act[14] and the Flood Control Act of 1938;[15] but since all powers granted by those statutes pertain to the regulation of other governmental agencies in the production and distribution of electric energy and have no direct regulatory effect upon the public, they will not be discussed in this monograph.

The Functions and Duties of the Commission

The Federal Power Act. Part I of the Federal Power Act gives the Commission licensing power over all projects for the development of power (mechanical or electric) on navigable waterways and, when the Commission finds that commerce will be affected, over projects on non-navigable streams subject to the control of Congress under the commerce power. Broad regulatory powers over the licensees are also granted. In addition, Part I requires the Commission to

11. Approved June 21, 1938, 52 Stat. 833; 15 U.S.C. 717-717W.

12. Approved May 18, 1933 , 48 Stat. 58.

13. Approved August 20, 1937, 50 Stat. 731.

14. Approved May 18, 1938, 52 Stat. 403.

15. Approved June 28, 1938, 52 Stat. 1215.

make studies, investigations, and reports to Congress to the end that the public interest will be protected in the development of water power.

Part II gives the Commission power to regulate the transmission and sale at wholesale of electric energy in interstate commerce to the extent that those matters are not subject to state regulation. It directs the Commission to divide the country into regional districts for the voluntary interconnection and coordination of facilities and gives the Commission power to license (on application) or to require (on complaint) the interconnection of transmission facilities. Similar authority to act on its own motion is given the Commission in time of war or emergency, in which case it is expressly provided that notice and hearing need not be given the affected parties; but only a temporary connection may be required under these circumstances. In case of an emergency requiring immediate action the power companies may make temporary physical connection of facilities without license. The export of power without authority from the Commission is also forbidden by Part II.

The Commission is in addition given control over the sale, lease, merger and consolidation of facilities of public utilities, and the acquisition of the securities of one public utility by another. The issuance of securities and the assumption of liabilities by public utilities when such matters are not regulated by a state commission, is

under the jurisdiction of the Commission. Rates and services are also subjected to its control.

The Commission is directed to cooperate with states and state commissions in the administration of Part II. Provision is made for the use of boards composed of representatives of a state or states, who may exercise the powers of members of the Commission when designated by the Commission to hold hearings.

Part III authorizes the Commission to control the accounting practices of licensees, public utilities subject to the Act, and agencies of the United States engaged in the generation and sale of electricity for public use, and subjects to examination by the Commission the books and records of persons controlling licensees or public utilities. Dealings in securities of public utilities by their officials for personal profit is made unlawful and various interlocking directorates without authority from the Commission are forbidden.

Powers to investigate, issue subpoenas, hold hearings, adopt rules of practice and promulgate regulations are given the Commission.

Procedural provisions for rehearings and judicial review on petition to the Circuit Courts of Appeals and the Court of Appeals for the District of Columbia are contained in Part III. Sanctions for violations of the Act and the orders and regulations of the Commission are also provided.

The Natural Gas Act. The provisions of the Natural Gas Act apply to the transportation of natural gas in interstate commerce and to its sale in interstate commerce for resale for public consumption, but the Act does not extend to the local distribution of natural gas or the facilities for such distribution or to the production or gathering of natural gas.

The Act forbids the importation and exportation of natural gas without authority from the Commission. It provides for regulation of rates and services, control over the extension and abandonment of facilities, and the keeping of accounts by natural gas companies, and otherwise subjects the natural gas industry to control generally similar to that provided in the Federal Power Act.

Organization of the Commission and its Staff.

The Commission is composed of five members appointed by the President with the advice and consent of the Senate, not more than three of whom may be appointed from the same political party. They hold office for five years, but the terms of office are so arranged that one expires each year. Their salaries are $10,000 per annum. They elect their chairman and vice-chairman. The members of the Commission may not engage in any other business or employment and may not hold an official relation to any licensee or to anyone engaged in the generation, transmission, distribution or

sale of power; nor may they own stock or bonds of, or be otherwise pecuniarily interested in, a power company.[16]

The Federal Power Act specifically authorizes the Commission to appoint, prescribe the duties, and fix the salaries of a secretary, a chief engineer, a general counsel, a solicitor,[17] and a chief accountant. Provision is also made for the appointment of other necessary employees. The Commission has approximately 790 full-time employees, of whom some 590 are stationed in Washington, the remainder being attached to the five field offices[18] which operate under the general supervision of the Chief Engineer and the immediate supervision of regional directors. In addition to the officers specifically provided for in the Power Act, the full-time staff consists of 42 lawyers in the Bureau of Law and 5 in the Chief Examiner's Division, 242 engineers, 100 accountants, and 22 other professional or expert employees.

At present the Commission's staff is divided into a number of "bureaus", "offices", and "divisions", organized along professional rather than functional lines and responsible directly to the Commission; and some of the "bureaus"

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16. It is interesting to note that no provision is made against the possession of similar interests in competitive fields, and the Natural Gas Act makes no provision with respect to similar interests in the natural gas industry.

17. Recent appropriation acts have failed to provide a salary for the Solicitor - hence, the office is vacant.

18. Located at New York, Atlanta, Chicago, Denver, and San Francisco.

and "offices" are further subdivided into "divisions" and "sections". The major organizational system is modified somewhat in practice by the use in many cases of a "Supervising Commissioner", who acts as a coordinator, monitor, and adviser to the staff as well as liaison officer between the other members of the Commission and the staff.

Volume of Business

It is extremely difficult, if not impossible, to describe within reasonable compass the volume of business before the Commission. Statistics are not meaningful, since cases may vary from an application for a license to install a one-horsepower water wheel in a tiny mountain stream for the use of the licensee alone, to the complicated utility valuation and rates cases; hearings may take a few hours or many weeks; and the values of the interests involved may range from a few dollars to tens of millions. Moreover, statistics already compiled are not so full and detailed as might be desired and therefore do not lead to fruitful interpretation. For whatever they may be worth, however, the following tabulation and other statistics are submitted.

Declarations of Intentions and Licenses Under Part I of the Federal Power Act

	Total 1920-1939	Filed or applied for in fiscal year 1939	Issued or granted in fiscal year 1939	Pending July 1939	Licenses outstanding, July 1, 1939
Declarations of Intention for licenses and preliminary permits	150	6		4	
Applications (excluding renewals)	1601	102		181	
Licenses, Major projects		14	11	33	124
Minor projects		14	21	10	145
Minor parts of major projects) Transmission lines)		68	27	2 115	32 341
Preliminary permits		6	1	8	3
Renewals		10		13	
Applications for amendments to licenses		62	38		
Applications for transfer of licenses		15	14	25	
Applications - Miscellaneous		38		30	
Applications to restore public lands to entry and settlement		74	91*		

* Acted upon, but disposition not indicated

Fees and charges amounting to $730,978.19 were collected from licensees by the Commission in fiscal 1939. Hundreds of rate schedules under both the Power Act and the Gas Act have been filed and examined, and up to June 30, 1939,

1,286 proposed changes in gas and electric rates had been submitted. These changes included 5 increases and 42 decreases in electric rates, and 52 increases and 5 decreases in gas rates. Seventeen applications for authority to merge, consolidate or otherwise dispose of electric facilities, and nine applications for authority to issue securities or for approval of credit contracts were received in fiscal 1939. It is estimated that reductions in electric rates between July 1,1934, and December 31, 1937, resulted in savings to consumers of $162,761,491; but what part of that saving is attributable to the activities of the Commission is not known. Several hundred projects have been reported to the Commission as operating without appropriate authority. What proportion of such projects are subject to the licensing provisions of the Federal Power Act is not known, although investigation is continuing.

Under the Natural Gas Act, 44 formal proceedings, including 28 rate cases, had been instituted up to June 30, 1939. Six applications for certificates of public convenience and necessity (involving approximately 2,000 miles of pipe line) had been filed, one had been granted and one withdrawn. Six applications for permission to export and one to import natural gas had been filed.

Because the actual processes of hearing and of post-hearing consideration of cases are not substantially different in the various categories of actions in the Commission's jurisdiction, discussion of those processes is reserved for later treatment in this monograph. In the immediately following pages discussion is largely limited to the problems which arise prior to the commencement of formal hearings.

Licensing of Power Projects

Licensing the construction and maintenance of power projects is one of the important functions of the Commission. Although it issues several other types of licenses, a license in the parlance of the Commission and its staff relates to a power project. A license must be obtained before any project for the development of water power can be lawfully built or maintained

(1) in, across, or along any navigable waters of the United States;

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19. The Commission has power to require the installation of the ultimate power development of licensed projects; to order the extension, improvement, and physical interconnection of facilities; to permit the abandonment of services and facilities; to determine the recapture price of licensed projects; to expropriate excess profits of licensees; to impose penalties and forfeitures for violation of its orders, rules and regulations; and to fix bonds for licensees desiring to enter the lands of another. None of these powers has ever as yet been exercised and therefore they are not discussed in the monograph. The procedure which would be involved were these aspects of the Commission's authority to be brought into play, is not closely prescribed by statute nor particularized by (continued)

(2) in any other waters over which Congress has jurisdiction under the commerce clause, if the Commission finds that the project will affect the interests of interstate or foreign commerce;

(3) upon public lands or reservations of the United States; or

(4) to utilize surplus water or water power from any Government dam.

Declaration of Intention; form and contents. In cases in which there is doubt concerning the Commission's jurisdiction over a particular project - cases involving non-navigable streams constitute the bulk of the matters arising under this head - a preliminary proceeding is available to try out the issues upon which the authority of the Commission depends. That proceeding is initiated by the filing (under section 23(b) of the Act) of a "declaration of intention" by one who proposes to construct a water-power project. Under the rules of practice the declaration must: (1) be submitted in triplicate, (2) be typed or printed on paper of a specified size, (3) be signed by the party in interest or his attorney, and (4) contain (a) a brief description of the proposed project, (b) a sketch map showing the stream or streams to be utilized and the approximate location of the project, and (c) a statement of the proposed method of operation and the power interconnections contemplated.[20]

(continued) existing regulations. It may be assumed that the procedure employed will be largely an adaptation of what is described in the following pages.

20. Strict compliance with the formal requirements of the rules of practice is not enforced. In the case of small projects the Commission will act on very informal declarations.

Notice and initial consideration. Each declaration of intention is referred to the Bureau of Engineering, where it is assigned to an engineer for consideration.[21] Almost invariably investigation in the field is necessary. In this activity the services of the Departments of War, the Interior, or Agriculture are frequently obtained, although in many instances the Commission's field staff makes the investigation. If it is decided to refer the matter to one of those Departments for investigation, a letter to the appropriate official is prepared in the Bureau of Engineering for the signature of the Secretary; but if the field staff of the Commission is to be used, the Chief Engineer may, and usually does, send the matter to a field office without reference to the Secretary. When a report from the field is received, it is sent to the Bureau of Engineering for consideration. There a memorandum summarizing the results of the investigation and indicating the probable consequences of the construction of the project is prepared for the Commission by the staff and approved by the Chief Engineer. The memorandum and the file are transmitted to the Bureau of Law, through the Docket Section which serves as a clearing house and recording agent for all inter-bureau transfers.

21. A preliminary step is taken in the "Docket Section" of the Secretary's Office, which maintains the master docket of the Commission and to which each declaration of intention is sent immediately upon its receipt. There the declaration is docketed and a letter is prepared for transmittal to the governor of the state in which the proposed project is to be located.

The matter is received in the Bureau of Law by the attorney in charge of administration who supervises the Bureau's docket and assigns cases to attorneys. He assigns the matter to an attorney for consideration and the preparation of a memorandum to the Commission. The attorney checks the documents to see that there is probable cause to believe that at a hearing the jurisdiction of the Commission can be established. Whatever his decision in that regard, he prepares a memorandum for the Commission and a proposed order which are reviewed by an Assistant General Counsel and, when approved, transmitted with the memorandum of the Bureau of Engineering and the file to the Secretary after clearing through the administration office of the Bureau of Law and the Docket Section of the Secretary's office.

The Secretary enters the matter on the calendar for the next meeting of the Commission and sends copies of all documents to each commissioner for study before the meeting.[22] Examination of the memoranda in the file usually suffices to inform a commissioner whether the question of jurisdiction is at all doubtful. At the meeting of the Commission the matter is considered, a vote cast, and except where it is plain that jurisdiction does not exist a hearing is ordered[23]

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22. The Commission holds a regular meeting each Tuesday at 10:00 A.M. and special meetings whenever called by the Chairman.

23. As a general rule a hearing will be omitted only when the staff's investigation has shown beyond doubt (continued)

and a supervising commissioner is designated by the Chairman.[24] The order fixes the time (usually about thirty days later) and place (usually the Commission's office in Washington) for the hearing.

The Secretary notifies the Bureaus of Law and Engineering and the Chief Examiner of the order for hearing, sends a copy of the order to the party filing the declaration, and the Division of Information prepares a press release. Copies of the press release are mailed to the governor and the United States senators of the state and the congressmen of the districts in which the project is to be located.

(continued) that the facts upon which the Commission's jurisdiction depends do not exist. In a few other very rare instances a hearing has not been ordered when an earlier decision of the Commission has held the waterway involved to be navigable; but even when such an earlier decision has been made, a hearing is usually ordered if the declarant has evinced doubt concerning the accuracy of the prior determination. In the cases in which a hearing is not ordered the Commission makes a general finding of navigability or want of jurisdiction, as the case may be, and approves the order submitted or instructs the Secretary to procure a proper order from the Bureau of Law. If the latter course is followed, the Secretary advises the Bureau of Law of the action of the Commission and requests the preparation of a suitable order for adoption by the Commission at a later meeting.

24. The selection of the supervising commissioner in all cases is generally controlled by the volume of work already assigned, although familiarity with a particular subject matter or special knowledge of conditions in the geographical area involved may influence the Chairman's decision. It is the supervising commissioner's function primarily to assure prompt staff attention to cases. His relationship to the individual cases assigned to him appears to be of an essentially administrative character, in so far as it differs from that of the other commissioners, all of whom join equally in consideration of the merits when the case is presented for decision.

The order for hearing does not specify any issue to be considered since only two issues are possible: (1) whether the waters are subject to the jurisdiction of Congress under the commerce power, and (2) whether the project will affect the interests of interstate or foreign commerce. Although the statute does not require the filing of a declaration of intention unless Congress has jurisdiction over the stream, the Commission does not treat the filing of a declaration as a concession of that point and it sometimes happens that a declaration denying all jurisdictional facts will be filed as a matter of caution in an effort to obtain a formal order of the Commission denying jurisdiction. Thus both issues are present, though perhaps not contested, in all cases.

Designation of an Examiner. Until January 28, 1936 the entire Commission formally designated the examiner to preside at the hearing; but on that date the Commission gave the Chairman general authority to designate presiding officers taken from a limited group within the Commission. On November 3, 1939, the authority of the Chairman was extended to permit him to designate a commissioner or any member of the Commission's staff to preside at public hearings. The procedure is still cumbersome, however, and it seems to be unnecessarily so. When the Chief Examiner is notified that the matter has been set for hearing he selects one of his staff to preside and fills out a form making the nomination. The form is sent to the supervising commissioner, who, if he

approves, initials it and forwards it to the Chairman for signature.[25] When the Chairman has signed the order of designation it is sent to the Secretary who notifies the Bureaus of Law and Engineering.

Final Disposition. At the hearing the declarant opens the evidence and attempts to show that the stream is not subject to the jurisdiction of Congress and that the project will not affect the interests of interstate or foreign commerce. The Commission's counsel then introduces the evidence in support of the Commission's jurisdiction and the declarant undertakes to rebut. Frequently the declarant makes his strongest showing in rebuttal. When all the evidence is in and the matter is submitted to the Commission, it does not enter an order, but merely "finds" the existence or absence of the facts upon which its jurisdiction depends.

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25. It is said that not once in twenty times will the supervising commissioner question the Chief Examiner's nomination and only once in nearly six months has any change been made. So far as can be ascertained the chairman has never overruled the recommendations made to him, but the practice of submitting recommendations to him is justified on the ground that since he is the chief administrative officer of the Commission it is only appropriate that he sign the order. The burden of this procedure is small in itself and affects only the Commission. It is multiplied many times in other matters of detail and is typical of the attitude of the Commission and its unwillingness to delegate any authority to the staff or even to its members generally. Apparently the Chief Examiner is entirely competent to select the examiner who is to preside in a particular case and in any event the supervising commissioner who has some knowledge of the case is better situated than the Chairman to make the selection. It would seem that even if the Commission insists upon taking an active part in the process of selection it would be more expedient to give the Chief Examiner the power to designate subject to veto by the supervising commissioner.

If the Commission finds that it lacks jurisdiction, the declarant may of course proceed with the construction of his project without further reference to the Commission, but if the jurisdictional facts are found to exist authority to proceed must be obtained from the Commission by preliminary permit[26] or license. Usually a preliminary permit is first sought in the case of major projects,[27] except where a declaration of intention has been filed, in which case an application for license is filed.

Applications for preliminary permits and licenses. To obtain either a preliminary permit or a license a detailed application must be filed showing the plans of the applicant and financial ability to carry them out. Forms are furnished for the purpose and specified supporting exhibits are required by regulation. An application for a license is required to be stated in somewhat greater detail than one for a preliminary permit and applications dealing with major projects must be more detailed than those dealing with minor projects.

Sections 4(e) and (f) of the Act require the Commission to give notice of the filing of an application for a

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26. Section 5 of the Act provides that a preliminary permit "shall be for the sole purpose of maintaining priority of application for a license under the terms of this Act for such period or periods, not exceeding a total of three years, as in the discretion of the Commission may be necessary for making examinations and surveys, for preparing maps, plans, specifications, and estimates, and for making financial arrangements."

27. Projects are classified as "major" when the installed capacity will be in excess of 100 horsepower. The regulations provide for the issuance of preliminary permits only in the case of major projects.

preliminary permit or a license not preceded by a preliminary permit to any State or municipality likely to be interested in or affected by such application; and to "publish notice of such application once each week for four weeks in a daily or weekly newspaper published in the county or counties in which the project or any part thereof or the lands affected thereby are situated".[28] Section 24 requires that whenever public lands are included in a proposed project the local land office shall be given notice of the filing of the application, the date of filing, and a description of the lands affected. The Secretary's office gives the required notices by letters to the governor, senators, congressmen, utilities commissions and, when necessary, to the land office and other interested government agencies, and supplies the Division of Information with materials for a press release.[29]

Amendments of applications. At any time prior to the issuance of a preliminary permit or a license the application may be amended by simply filing such substitute documents as may be necessary to show the proposed changes. No

28. Section 10(i) provides that: "In issuing licenses for a minor part only of a completed project, or for a complete project of not more than one hundred horsepower installed capacity, the Commission may in its discretion waive such conditions, provisions, and requirements of /Part I/ except the license period of fifty years . . . " It has been the invariable practice of the Commission to waive the provisions of the Act relating to notice in the cases covered by that section, and no notice whatever is given.

29. It is estimated that 10,000 notices will bring about 50 responses of all kinds.

rule as to giving notice of amendments to applications has been established but it is said that, as a general rule, notice is not given in the absence of specific directions by the Commission issued when the application is submitted for final action. This general rule might be subject to exception when in the judgment of the Commission or the Supervising Commissioner an amendment amounted to a complete departure from, rather than a change in plans. In case of doubt as to whether an amendment assumed the proportions of a departure the commissioner who ordinarily supervises similar cases would be consulted and might either issue instructions himself or submit the matter informally to the Commission for decision.[30]

Staff consideration of applications. When docketed, applications are sent to the Bureau of Law for a preliminary examination to see that the requirements of the regulations as to form have been met and then are transmitted to the Bureau of Engineering for study. The Bureau of Engineering considers the structural aspects of the project works, the effect of the project on navigation and other power development in the waterway and whether other plans might not be better suited to the public interest. The Bureau may correspond or consult with representatives of the applicant in aid of its studies or to suggest changes. A memorandum

30. The statement of possible procedure in the exceptional cases is based largely on speculation rather than experience since actual cases, if they have arisen, have not been discovered in this study.

recommending the denial or the granting of the application with the imposition or waiver of conditions is prepared for the Commission and forwarded with the file to the Bureau of Law. There the application is closely scrutinized to see that all legal requirements have been satisfied and the memorandum of the Bureau of Engineering is checked to see that the recommendations are consistent with the Act. A memorandum and a proposed order are then prepared, approved by an Assistant General Counsel, and submitted to the Commission through the Secretary. The Secretary sends copies of the memoranda to each of the commissioners for study before the meeting at which the application is to be considered and places the matter on the calendar.[31]

Commission action. At the meeting of the Commission it may be decided that the financial situation of the applicant requires study; but in the case of states, municipalities, and large corporate interests whose financial condition is already well known to the Commission, further inquiry on that score is of course unnecessary. If such a study is deemed desirable, the matter is referred to the Bureau of Accounts, Finance and Rates for report and the matter is reconsidered at a subsequent meeting on the basis of the memoranda from all three Bureaus.

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31. In a few instances an applicant has sought a hearing before the Commission acted on the application. In very rare instances the request has been granted and a hearing held. Hearings are almost always held, however, when protests have been received or denial is contemplated. See page 24, infra.

When the Commission acts, the Secretary records the vote in the minutes, signs the order submitted by the Bureau of Law or procures another which he submits to the commissioners for initialing and then signs. Copies of the order are sent to the applicant and to the Bureau of Law, which prepares a proposed form of license (or permit).[32] The draft of license is prepared by the Bureau of Engineering, checked by the Bureau of Law and sent by the Secretary to the applicant in triplicate for acceptance, which is indicated by signing the license and returning it to the Commission within sixty days after receipt. If the license is accepted, the Chairman signs, the Secretary attests and seals it, and one copy is sent to the licensee. The process is then complete.

Reconsideration. It sometimes happens that the applicant declines to accept a tendered license because the conditions are believed to be unreasonably or unnecessarily onerous or beyond the power of the Commission to impose.[33] In such cases relief may be sought by refusing to accept the license and either merely corresponding with the Commission or filing a formal petition for reconsideration. Letters or other communications will receive the same consideration by the Commission as will formal petitions, but an applicant who

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32. Much of the license is standardized, but some special provision must always be included.

33. See, e. g., United States v. Appalachian Electric Power Co., 107 F. (2d) 769 (C.C.A. 4th, 1939).

foresees litigation over the license will usually adopt the formal method. Requests for reconsideration, whether formal or informal, are sent to the Bureau of Law where they are considered by the attorney who worked on the case in the preliminary stages. If a question of engineering is raised, he refers the application to the Bureau of Engineering for study and the preparation of a memorandum for the Commission and the procedure follows that leading to the initial decision by the Commission.

Procedure when denial is contemplated or protests are received. It sometimes happens that protests against the granting of a preliminary permit or a license are received by the Commission. Protests may be informal communications or formal documents meeting the requirements of the Commission's regulations. Informal protests are referred to the Bureau of Law; where any semblance of merit is shown, the Bureau, through the Secretary, will suggest to the protestant that a formal protest be filed if he desires to press the matter.[34] If the suggestion is not acted upon, comment upon the informal protest will be included in the memorandum to the Commission and it will be recommended that a hearing be ordered on the Commission's own motion.

Formal protests[35] must show that they have been

34. Frivolous protests and crank letters are disposed of by acknowledgment without more.

35. No protest however formal and meritorious gives the protestant any standing before the Commission or (continued)

served on all interested parties before they will be accepted for filing by the Commission. When filed they are referred to the Bureau of Law, which submits a recommendation as to the action to be taken. Either of two courses may be adopted depending on the nature of the protest. If it merely recommends a permissible condition or limitation (such as a time limit for the completion of the project) which would be recommended to the Commission anyway and there is no action by the applicant in response to the protest, the entire matter will be submitted to and acted upon by the Commission in the usual manner. But if the protestant objects to the issuance of a license on apparently meritorious grounds, a hearing will be ordered.

When no protests are received, but the Commission is not inclined to grant the application on the basis of the information before it, a hearing will be ordered.

The orders for hearing do not ordinarily specify the matters which lead to their issuance. Thus, unless formal protests have been filed and served, the applicant is left in the dark as to the issues to be tried at the hearing. The consequence of the Commission's failure to restrict the issues is an unfortunate one. An applicant must establish

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(continued) right to participate in the proceeding. The only apparent reason for the existence of the rules as to protests is that they may lead to the use of at least some formal protests which are more easily docketed and filed as part of the record than letters and post cards. Legally, they have no effects different from those flowing out of informal protests.

affirmatively that his plans do not offend against any of the various prohibitions which might have led to their rejection, even though there is no doubt in the Commission's mind that the plans are not defective in respect of some of these elements. The applicant must show, for example, that the project he proposes will not cause or aggravate floods, even when the Commission's engineers have accepted without question that the plans are unexceptionable on this count. He must do so because he has no way of knowing with assurance the Commission will not find his proofs unsatisfying because of omission of that very issue. The upshot is that, with no particularization of issues and with no stipulations to supplant the tedious offering of evidence, both applicants and Commission are put to heavy expenditures of time and money which might well have been avoided.[36] The practice is sought to be defended on the grounds that (1) the entire application is in issue and an attempt to specify particular issues would deprive the Commission of an opportunity to act without delay on matters developed at the hearing, but not specified in the notice;[37] (2) the applicant is put on

36. Specification of certain issues for hearing in connection with license applications, with reservation of the privilege of specifying still further issues at a later hearing if necessary, is not unknown in the Federal administrative system. See this Committee's Monograph No. 3, "Federal Communications Commission," at p. .

37. This defense seems to be of inconsiderable consequence. The occasional and not prolonged delay which might be incident to the amendment of the defined issues would probably inconvenience applicants considerably less seriously than does their present uncertainty concerning the matters as to which the Commission may have real doubts.

notice of the Commission's position by the statement of its counsel at the hearing, the nature of the Commission's evidence, and the brief of the Commission's counsel filed after the hearing;[38] (3) that conferences and correspondence preceding the order for hearing indicate the nature of the Commission's position;[39] and (4) that the number of cases set down for hearing on the Commission's motion in the absence of protest is extremely small.[40]

Notice of the hearing is given as in the case of hearings on declarations of intention. Under the Commission's rules protestants are not parties, but may petition to

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38. The difficulty with this defense is that these asserted indications of the Commission's views do not come until after the applicant has discharged the burden of meeting every possible objection which the Commission might hypothetically advance against his obtaining a desired license.

39. There is no institutionalized method of informal conferences in the class of case now under discussion. On the contrary, the Commission has discouraged such conferences and has even formally ordered (Administrative Order No. 1, November 30, 1937) that no members of its staff may confer with participants in any matter pending before the Commission without first being authorized to do so by the General Counsel or the Supervising Commissioner. Even were clarifying conferences of an informal character held prior to a hearing, moreover, an applicant would, it seems, proceed at his own risk if he failed to establish his case on every possible ground, for apparently the Commission will not tolerate stipulations that certain issues are not in dispute.

40. But even in cases where protests have been filed, applicants can not rest assured that the issues have been narrowed, for (a) informal protests are not even communicated to applicants, and (b) formal protests, while they may be the generating causes of hearing, do not have the effect of circumscribing the Commission's freedom to act on a ground that is set forth in the protest.

intervene and become parties.[41] Full intervention or "limited participation" may be allowed in the discretion of the Commission, but, whatever the position of the protestant may be, the Commission does not leave him to his own devices in presenting his case but instead, it actively participates and aids the protestant in every reasonable way.

The Commission does not regard itself as bound by stipulations or by statements of counsel at the hearing; it is asserted, however, that if the decision in a case were to turn on a point not clearly made at the hearing by the Commission's counsel, a rehearing would be ordered.

The orders of the Commission are usually divided into three parts, namely, the "appearing clause" in which various facts are recited but not "found"; the "findings"; and the "order". The division of facts "appearing" and those "found" seems, at times to be arbitrary. It is said to be based on the difference between evidentiary and ultimate facts, or non-essential but explanatory facts and essential findings.

Compulsory licensing. Many constructed projects are deemed subject to the licensing provisions of the Act, but are nevertheless still unlicensed. The Commission has moved slowly into this field because it involves a tremendous volume of work and will probably lead to a great deal of

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41. For discussion of procedure attendant upon petitions to intervene, See infra p. 82.

litigation. It is the policy of the Commission to seek to induce the licensing of those projects rather than to resort at once to penal proceedings for failure to obtain a license.

Proceedings to compel the filing of an application for a license or the acceptance of a license are initiated by one of the Bureaus. Wherever the case may be initiated an explanatory memorandum is prepared for the Commission; this memorandum is routed to the Bureau of Law (when it does not originate there) for that Bureau's approval; and, if it agrees that a probable disregard of the law has been shown, the Bureau of Law drafts a confirmatory memorandum and a proposed order to show cause, after which it transmits the whole file to the Secretary for submission to the Commission. If the Commission adopts the recommendations made to it, the order is signed by the Secretary, who notifies the Bureaus interested of the Commission's action and sends a copy of the order to the owner of the project who is named as the respondent in the order.

The order states no facts as findings, but does set out the necessary jurisdictional matters as "appearing" to the Commission and requires the respondent to show cause within a limited time, why application for a license should not be filed.[42] The Commission's authority to order the

42. When a license has been issued by the Commission but rejected by the intended licensee, the same procedure is followed if the applicant proceeds with construction; in such a case, however, the order is to show cause why the license should not be accepted.

filing of an application or the acceptance of a license is now being challenged in the courts.[43]

The issuance of the order to show cause invariably leads to the filing of an application or active resistance by the owners of the project. Resistance is frequently based upon jurisdictional grounds, but since the jurisdiction of the Commission almost inescapably depends upon highly particularized facts rather than upon generalized propositions of law, the defence is usually presented in the first instance by answer rather than by motion.

When an answer is filed, the matter is set down for hearing by order of the Commission and an examiner is appointed in the usual manner. At the hearing the Commission's representatives assume the burden of making out an affirmative case, since the purpose of the hearing is to determine the facts upon which further action by the Commission must depend. At the conclusion of the hearing the matter is sub-

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43. The Commission purports to act under Section 314, which empowers it to apply to the federal district courts for the enforcement of its orders; but nowhere in the Act is there a clear authorization to enter the type of order discussed in the text. The question has not yet been settled, since the only suit brought by the Commission for the purpose was instituted before the Act was amended in 1935, and therefore is in form an action to enjoin the maintenance of an unlicensed project. United States v. Appalachian Electric Power Co. 107 F. (2d) 769. (C.C.A. 4th, 1939). It is raised by the Pennsylvania Water & Power Co. in two actions, one in the United States District Court and the other in the United States Court of Appeals for the District of Columbia, seeking an injunction against and a review of, respectively, an order of the Commission to file an application for a license for the Holtwood project on the Susquehanna River.

mitted to the Commission,[44] which either makes a finding that the jurisdictional facts do not exist or enters an order which includes findings of the jurisdictional facts and a direction to file an application for a license within a limited time. While no case has yet arisen, it is said that non-compliance with the order might lead to a second order directing the General Counsel to institute appropriate judicial proceedings to enjoin violation of the order rather than violation of the Act.

Amendments of preliminary permits and licenses. After a preliminary permit or a license has been issued and accepted, amendments may be obtained only by filing formal application with the Commission. Applications for amendment of a preliminary permit are required by rule to "follow the form prescribed for original applications, as far as applicable", while a form of application for amendment of licenses is prescribed by the Commission.

If an application for amendment of a preliminary permit embraces sites or areas not covered by the original permit, the Commission's rules require notice to be given "in the manner required for the original application"; but when an application for an amendment of a license is filed no notice is required unless "the contemplated changes are of such character as to constitute a substantial alteration of

44. Discussion of the manner in which cases are treated after the close of hearings appears infra pp. 88 ff.

the license", in which event public notice must be given at least 30 days prior to final action on the application. The reasons for the variations in the requirements are not entirely clear. It is said that the difference in the rights conferred by preliminary permits and licenses justifies this difference in requirements, but the statute does not support that proposition. Instead, it requires notice of the filing of all applications for preliminary permits although it requires notice of application for a license only if it is not proceeded by a preliminary permit.

Applications for amendments to preliminary permits or licenses are sent to the Docket Section for recording and are then transmitted to the Bureau of Engineering for study. From the Bureau of Engineering applications are passed along to the Bureau of Law which, in addition to preparing the usual memorandum for the Commission, decides whether notice should be given. If it is decided that notice is required the Secretary's Office is notified, the notice is prepared there, with the assistance of the Bureau of Engineering when needed, and issued as in the case of original applications. If it is decided that no notice is to be given, the matter is submitted to the Commission as soon as the usual memoranda can be prepared,[45] while if notice is given submission to the

45. Conceivably the Commission may overrule a decision that notice need not be given, but so far as can be ascertained that situation has not arisen.

Commission is deferred so that appropriate comment on responses to the notice may be included in the memoranda.

As in the case of applications for original permits or licenses, the Commission usually acts upon applications for amendments without hearing.

Renewal of licenses. The regulations of the Commission require applications for the renewal of licenses to be filed at least three months prior to the date of expiration of the license to be renewed. However, though no sanction is provided and no particular effort at strict enforcement is made, it is rare that the operators of a going project fail to comply literally with the regulation.

The procedure in renewal cases is in all respects parallel to that in application cases except that only one exhibit, a map of the project, is required to be filed, and no notice is given. Renewal has never been denied.

Surrender and termination. Licenses may be surrendered only with the permission of the Commission. Applications for surrender must state reasons and except in the case of minor projects or transmission lines must be in the form prescribed for applications for licenses. In the excepted cases any informal application is sufficient. The procedure is similar to that followed in the issuance of licenses.

After notice and opportunity for hearing, the Commission may, by administrative action, terminate licenses for failure to commence construction within the time prescribed,

or cancel preliminary permits for "cause".[46] It may not terminate a license as to any part of the project works on which construction has been commenced except by judicial proceedings brought by the Attorney General. Termination by Commission action is accomplished by giving formal written notice by registered mail 90 days in advance of the order of termination. The notice is, in substance, an order to show cause why the license should not be terminated. A time for answer is fixed in the order. A hearing is ordered when the answer is filed and may lead to an extension of time or modification of the provisions of the license which have been violated, if justification or excuse can be shown.

If no hearing is requested, the order of termination issues as of course.

Assignment of preliminary permits and licenses. Section 5 of the Act provides that preliminary permits shall not be transferrable and Section 8 requires the approval of the Commission as a condition of voluntary transfers of licenses. In some instances, however, the Commission has approved the transfer of preliminary permits and it has never refused to approve a transfer of a license except in one instance when the transfer was a mere incident to a complete merger or sale of all facilities of the licensee.

46. No preliminary permit has ever been terminated. It is known that licenses have been rescinded, but statistics have not been compiled to show the number and officials are reluctant to hazard a guess, beyond saying that there have been "only a few" cases in which the Commission has itself terminated a license.

Applications for the approval of transfers must be filed jointly by the licensee and the prospective transferee. The application is required to be submitted in quadruplicate and to be verified. The application must set forth in detail the qualifications of the transferee to hold the license and to operate the property, the required qualifications being the same as those demanded of applicants and licensees. Applications for transfer are handled in the same manner as applications for license.

Restoring public lands to entry, location and selection. As soon as an application for a preliminary permit or a license is filed and notice is given to the local land office, all lands of the United States included within the project described in the application are withdrawn from entry, location and selection.[47] Out of an abundance of caution applicants usually include in their descriptions of their projects more land than will be necessary and, therefore, it frequently happens that valuable public lands are withdrawn without good reason. The lands remain closed until the Commission either enters an order restoring them to entry before decision on the license application or issues a license excluding them from the project.

The Commission's rules provide for formal application for orders pending action on license applications, but

47. Compare this Committee's Monograph No. 21, "Department of the Interior", pp.

the most informal requests are frequently received and considered. Often a request that public lands be reopened comes from a prospective homesteader who scribbles to the Secretary of the Interior, the Forest Service, or some other government agency, a note which is relayed to the Commission and used by it as a basis for action. Applications, whether formal or informal, are referred to the Bureau of Engineering for a determination as to whether the land sought to be reopened is necessary to the project. When the study is completed, a recommendation to the Commission is prepared, sent to the Bureau of Law for the preparation of an appropriate order, and then transmitted to the Commission for final action.

Ordinarily no notice is given and no hearing is held, but if the action of the Commission is regarded by the power company as improper, a hearing could be obtained by appropriate motion. Usually there is no occasion for reconsideration since the Power Act requires the Secretary of the Interior to reopen the lands "subject to and with a reservation of the right of the United States or its permittees or licensees to enter upon, occupy, and use any part or all of /the/ lands necessary, in the judgment of the Commission, for the purposes of /Part I of the Act/ . . . which right shall be reserved in every patent issued for such lands . . . " Thus even in case of mistake by the Commission the power company is protected.

Determination of headwater benefits. The Power Act authorizes the Commission to require a licensee benefited by a headwater improvement of another licensee, permittee, or the United States to reimburse the owner of the headwater improvement "for such part of the annual charges for interest, maintenance, and depreciation thereon as the Commission may deem equitable", and when a project not under license is benefited by the work of a licensee, permittee, the United States, "or any agency thereof", the Commission may, after notice to the owners of the unlicensed project, fix a reasonable annual charge to be paid "on account of such benefits". In only two instances have these powers of the Commission been invoked. One became moot and was dismissed. The other was finally determined by the Commission after remaining pending nearly ten years.

Generalization from the case which has been carried to conclusion obviously would be unwise - particularly because it is said that the case which has been concluded is unique.

Determination of Cost and Fair Value

In order to establish a base for any subsequent rate-making or recapture proceedings, Section 4(b) of the Power Act requires the Commission to determine the actual legitimate original cost and the net investment in a licensed project, and to certify its findings to the Secretary of the Treasury. Section 23(a), however, provides that in the case

of the issuance of a license for the extension, improvement, or alteration of a project already constructed under other valid authority, the Commission shall determine the "fair value" of the project. The procedure followed by the Commission in making these determinations is substantially the same in both instances.[48]

The rules of the Commission provide that when a project is constructed under a license issued under the Act,

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48. At times, however, there may be a wide difference between actual legitimate original cost and fair value. In such cases, since the determination of the Commission will play a part in both rate-making and the determination of the recapture price to be paid by the Government, bitterly fought controversies may arise over the question as to which the Commission shall determine. The question may arise at any stage of the proceedings and, for this reason, an extremely expensive hearing may be conducted and then rendered valueless at least in part by a decision of the Commission that the wrong basis was used. While only one such controversy has actually occurred, (and it did not require the junking of an expensive record) it is not expected that it will stand alone. To avoid later complications, a decision by the Commission of the basis upon which the determination is to be made, might advantageously be reached before the hearing is commenced. One method might be to indicate in the license itself the Commission's view as to the section of the statute under which the license issued, so that controversies, if there were to be any, would develop at the outset. This method would not be satisfactory unless the Commission were to regard itself as bound by the determination and it has specifically rejected that proposition. Alternatively, the Commission might prescribe that before commencement of the proceedings themselves, the issue of classification of the project (ascertaining the basis upon which the determination is to be made) should be threshed out. This issue should rarely require a trial hearing, for the evidentiary facts upon which it rests are infrequently controverted and the real dispute revolves about questions of law, including interpretation of instruments of authority.

the licensee shall file within one year after the original project is ready for service an initial statement, under oath, with four additional conformed copies thereof, showing the amount claimed by the licensee as the actual original legitimate cost of the construction of the original project, and the price paid for the water rights, rights-of-way, lands, and interests in lands. Similar statements are required where licenses are issued for projects already constructed without authority, but in those cases the statement must be filed within six months after the date of the issuance of the license. In fair value cases, the licensee is required to file with the Commission within six months after the date of issuance of the license an inventory and appraisal in detail as of the effective date of the license, of all property included in the project. The inventory and appraisal must show or be accompanied by a statement of the actual original legitimate cost or, if that is not known, the estimated original cost of the property and an estimate of the accrued depreciation.

When these reports are received, they are referred for study to the Bureau of Accounts, Finance and Rates and to the Bureau of Engineering. These bureaus appraise the property of the licensee, audit books, estimate costs, and prepare a report to the Commission setting out their findings. The report is considered by the commissioner who usually supervises

such matters.[49] When it meets with his approval, a copy of it is sent to the licensee and other copies are sent to interested state public service commissions, or, when there is no state commission, to the governor of the State in which the project is located. In all cases the licensee is given not less than thirty days in which to file a protest to the report.

In every instance thus far encountered the Commission's staff has recommended the suspension or disallowance of some items of claimed cost or value and, with equal regularity, the licensee has protested against the recommendations. Thus, it has happened that in one case an estimated 50,000 items have been drawn in dispute. When the protest is received it is formally docketed and copies sent to the Bureau of Law. The Supervising Commissioner is advised by the attorney assigned to the case as to the character and scope of the protest filed. After consultation with the Bureau of Engineering and the Bureau of Accounts, Finance and Rates as to the assignments of those who prepared the reports, a draft of an order setting the case for hearing is sent to the Supervising Commissioner who submits it to the Commission for adoption. The Secretary notifies the interested bureaus

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49. While a supervising commissioner is designated for each individual major matter coming before the Commission, and while nominally the Commissioners have no permanent assignment to particular segments of the Commission's activities, in practice a measure of specialization has developed among the individual commissioners. Thus, each is customarily designated as the supervising commissioner in certain types of related cases.

and the Chief Examiner of the action of the Commission, and an examiner is designated in the usual manner.[50]

The report of the staff is a detailed statement of its findings, opinions, doubts, and suspicions. It is often argumentative to the point of being a brief. Thus, when it is served upon the licensee, full notice is given of the position taken. The protests, however, may be no more than a plea of the general issue, or they may be as detailed and argumentative as the staff report. The Commission does not restrict its consideration of the case to those items disallowed or suspended in the report, but asserts the right to review any item claimed by the licensee; and it is asserted that members of the Commission often apply themselves assiduously to an item-by-item consideration of the licensee's cost claims, so that review of points not previously urged by the Commission's staff is not a rarity. At the same time, it is insisted that if it were not made plain in the report or at the hearing that an item might be disallowed, a further hearing would be accorded the licensee though present officials of the Commission are unable now to recall an instance in which a proceeding was so reopened.

Hearings in cost and fair value determinations are marked by controversy over matters which seemingly could and

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50. See supra, p. 17 .

should be settled by stipulation.[51] Items which outwardly at least seem to involve little more than mathematical computation are established by evidence rather than agreement and at times the only evidence is offered by one side while the activity of the other party is limited to more or less perfunctory cross-examination.

The unwillingness to stipulate is attributed to the attitude of the Commission, which, it is said, feels that in the past when stipulations were used its interests suffered. Whatever the Commission's experience may have been, its present position in the matter seems to be unnecessarily extreme, particularly since the stipulations could now be settled under the watchful eye of a supervising commissioner.

Final disposition. At the conclusion of the proceeding the Commission makes detailed findings with respect to each item of cost or value claimed, allowed or disallowed, and orders the licensee to make appropriate entries in its books to show the conclusions reached and to report compliance within a limited time. When the notice of compliance is received, the findings of the Commission are formally certified to the Secretary of the Treasury as required by the Act.

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51. The rules of practice provide that in the case of a licensee who has constructed a project under a license the burden of proof rests upon him to establish the validity of every item claimed. While no such provision is contained in the rules relating to the other types of cost and value determination, it is the practice of the Commission to impose that burden upon the licensee. For this reason the licensee opens and closes the introduction of evidence.

The statute provides no method of judicial review specially applicable to orders made by the Commission relative to cost and valuation matters, nor does it in terms state that the findings are to be conclusive when and if used in later rate-making or recapture proceedings. Yet, it is plain that the statutory scheme contemplates finality for the findings if they are not appealed, for there would be no utility in carrying through a proceeding of this type if it were to be repeated subsequently on every occasion when the facts determined in it might be drawn in issue.

RATE-MAKING

Power companies and natural gas companies subject to the Commission's rate-making powers are required to file with the Commission schedules of their rates and all contracts, rules, and regulations affecting rates. These documents are referred in the first instance to the Division of Rates in the Bureau of Accounts, Finance and Rates for study. The enactment of the Natural Gas Act and the subsequent order of the Commission requiring gas companies to file their schedules, virtually swamped the Commission, and it has only recently reached a position where it can give thorough consideration to the entire field of rate-making. The Division of Rates has been forced to examine schedules to see only that the rates are not plainly exorbitant or completely out of line with rates for similar services generally. For the first time it is now making a thorough study of cost of production, net investment, and other factors influencing rate levels and structures, and more extensive activities in the field of rate-making may be expected.

Compelling filing of rate schedules. It sometimes happens that power or gas companies do not file their rate schedules with the Commission as required by the statutes and the Commission's regulations and general orders. When such a situation comes to the notice of the Commission, the Division of Rates advises the company that it is in default and requests

immediate filing. On occasion the company will flatly refuse to comply on the ground that it is not subject to the jurisdiction of the Commission. Sometimes the Company will dispute the Commission's jurisdiction, but furnish copies of the documents desired while still insisting that they are being supplied only as a matter of information and that they are not being "filed". In the second type of case the Commission may relax its efforts temporarily if the schedules show satisfactory rate levels and structures, so that no substantive matter is involved. But when the company refuses to "file" or "supply" copies of its schedules, the Commission undertakes to compel filing.

Flat refusal is reported to the Commission by memorandum of the Division of Rates with a recommendation that the recalcitrant utility company be compelled to comply with the law. If the recommendation meets with Commission approval, the matter is referred to the Bureau of Law for the preparation of an order to show cause why the schedules should not be filed. The Bureau of Law studies the facts to determine whether the Commission can make out a case in support of its jurisdiction and, if satisfied that there are reasonable grounds for proceeding, it prepares the order. The order is served on the company by registered mail. It directs the company to show cause within a limited time why it should not be held to be a natural gas company or a public utility and why its schedules or rates should not be filed. Since the jurisdiction of

the Commission is the only possible issue and the company is fully cognizant of the ground on which it disputes jurisdiction, there is no reason to tender a specific issue in the order. When the company answers but the response does not satisfactorily settle the issues, a hearing is ordered and the procedure, as in other types of cases, follows the forms presently to be described. If the response should show clearly that the Commission does not have jurisdiction the Bureau of Law would prepare a proposed order terminating the proceeding and a supporting memorandum, and submit them to the Commission for action.

While it is probable that as a matter of law these proceedings are unnecessary, since failure to file constitutes a violation of the law and the Commission may resort to the courts to stop such violations, the Commission prefers to employ the administrative hearing method in order to (1) hold the volume of its litigation to a minimum, (2) obtain a full disclosure of the facts before commencing litigation, (3) maintain better public relations, and (4) gain whatever advantage it may out of making findings of fact with respect to the matter to be litigated.

Action on rate schedules.

1. Original schedules. The regulations of the Commission require original rate schedules to be filed not less than ten days before they are to become effective.[52] After the lapse of the necessary time, however, an original schedule automatically becomes the legal schedule for the company filing it, since the Commission has no power to suspend it. The Commission may only launch an investigation into the rates and charges of the company and, at its conclusion, fix rates to be in force thereafter.[53]

Original rate schedules are referred, in the first instance, to the Division of Rates in the Bureau of Accounts, Finance and Rates which makes a study of the schedules in the light of materials on hand, such as other schedules and reports. Its findings and recommendations are reported directly to the Commission in a weekly report which contains a brief analysis of the schedule and a short statement of the Bureau's views. If the Commission believes that no action should be taken, the matter is dropped without any formal action; otherwise the Commission directs the Secretary to

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52. Regulations 35.3(b) under the Power Act and Provisional Regulation 54.3(b) under the Gas Act.

53. Even this power is somewhat limited by the provision of the Gas Act denying the Commission power to order any increase in gas rates except on application of the gas company filing the schedule.

instruct the Bureau of Law to prepare an appropriate order instituting an investigation for consideration and adoption at a later meeting.[54]

2. Schedules making changes in existing rates. A "new" schedule of rates (that is, one making a change or changes in currently effective rates) is required by the Commission's regulations to be accompanied by a statement justifying the change. Under the provisions of the statutes a new schedule does become operative not upon filing but only after the lapse of not less than thirty days except by permission of the Commission. Furthermore, the Commission has power to suspend a new schedule[55] for five months after its proposed effective date, if an investigation into the lawfulness of the new rates is instituted, and, when the inquiry is not completed within the suspension period, if the rates represent increases the company may not put them into operation unless it gives a bond satisfactory to the Commission and keeps records showing all amounts received by reason of the increases. The Commission may order appropriate

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54. According to available information the Commission has never instituted a rate-making proceeding in the absence of a complaint. The presence of a complaint, however, may serve as an inspiration for the initiation of a proceeding on the Commission's own motion, in which case the Commission assumes the burden of going forward instead of leaving the complainant to his own devices.

55. Except rates for the sale of natural gas for resale for industrial use only.

refunds to be made at the conclusion of the proceeding if the charges exacted are found to be excessive.

During the thirty-day period prescribed by the statutes the Commission has opportunity to make a preliminary analysis of the changes in rates proposed to be made. The analysis is made by the Division of Rates as in the case of original schedules and reports directly to the Commission and closed without formal action if no reason to proceed further appears.[56] If on the basis of the preliminary analysis the Commission is doubtful that the schedule should be approved, it may initiate a general investigation of the lawfulness of the rates and charges shown in the new schedule. If it is decided to institute an investigation, the Commission must then decide whether it shall exercise its statutory power to suspend new rates.[57]

Formal investigation.

Whatever the decision about suspension, the Secretary, by direction of the Commission, instructs the Bureau of Law to prepare an appropriate order for consideration and adoption at a later meeting of the Commission.

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56. That the Commission's scrutiny of these reports is close is indicated by the fact that in an estimated five percent of the cases the recommendation made to it is rejected.

57. The Commission has never suspended a new schedule making a reduction in rates. Since natural gas companies have invariably contested the Commission's jurisdiction, the possible ineffectiveness of suspension orders presents interesting questions and perhaps unusual opportunity for judicial review, with consequent delay.

If it has been decided to suspend a new schedule which is about to become effective, a special meeting to adopt the order may be called as soon as the draft is prepared by the Bureau of Law. When the order is adopted, the Secretary serves a copy on the company affected. If suspension is ordered, the statutes require the Commission to file a statement of reasons with the schedule and to serve a copy on the company. The statement is, as a matter of practice, contained in the order and is necessarily sketchy for the preliminary study has perforce been too superficial to warrant the assertion of explicit, detailed or comprehensive objections to the company's proposal. Hence, as a rule, the order does no more in substance than recite that the new rate has not been shown to be justified.[58]

In a limited investigation the order of the Commission is frequently fairly specific. It may take the form of an order to show cause why a discrimination should not be abolished and the same rates extended to two or more consumers, or it may require the utility to show that a proposed new rate is reasonable and lawful.

The orders instituting general investigations have been very broad and have in no way limited the scope of the

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58. The requirement that "new" schedules be accompanied by statements in justification would seem to restrict the field of possible controversy, but it is said that the failure of the utility companies to file adequate statements prevents the Commission from doing more than denying the validity of the justification advanced.

inquiry to be made nor has any other method of formally narrowing issues before or during hearings been employed. This practice is vigorously defended by Commission attorneys on the grounds that (a) at the time of the institution of the investigation the Commission does not and cannot know the controversies which may arise in the case; (b) disagreement between the utility companies and Commission representatives is invariably so extensive that every possible issue in a rate case is usually present, hence specification would be useless; (c) attempts at narrowing issues might prove embarrassing later if developments disclosed that a matter eliminated from consideration should be the subject of inquiry; (d) the practice works no hardship since the representatives of the utility companies have had much experience in rate work and are fully aware of the character of the facts to be established; (e) only the Commission can limit the issues; it could do so only on evidence before it; and the evidence ought to be in the record of the proceeding so that the Commission may consider the case as a whole rather than piecemeal; and (f) the course of the Commission's cross-examination and evidence shows the issues which are foremost in the minds of the Commission's staff and indicates the points to be stressed in the briefs. However, when it is considered that in some instances the utility company has been called upon to open the evidence at the hearing, one's first reaction is to feel

that the respondent is required to defend against an attack not yet made. Commission attorneys, however, are definitely of the opinion that the disadvantage of this situation is only apparent and not real.

At the hearing of a case involving a "new" schedule the utility company is required to open the evidence, but since under both statutes the companies have the burden of proof to sustain increased rates and the Commission so far has investigated only increases, it seems that the practice is unexceptionable.[59] While the practice of the Commission creates the appearance of requiring the respondents to shoot in the dark, attorneys for the Commission assert that in reality the opposite situation obtains because of the inadequacy of the justifications which are submitted.[60]

Hearing and post-hearing procedure in rate cases follow the usual patterns described infra, pp. 84, 88.

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59. Attorneys for the Commission carefully distinguish between "increased rates" and "increases in rates." To justify an "increased rate" the entire amount must be shown to be proper and the utility company may not start with the lawfulness of the old rate as a postulate.

60. In the period intervening between the notice of suspension and the actual commencement of hearings, the Commission's staff has continued its study of the proposed schedule, so that when the hearing date is reached the Commission's position has crystallized. In at least one case it has happened that the staff's further study prior to hearings disclosed that the suspension of the schedule was improvident. In that circumstance, the suspension was terminated forthwith and the order for hearing rescinded.

Exchange of exhibits.

It may be suggested that the Commission might profitably explore the possibility of pre-hearing conferences and exchanges of documentary materials which are intended to be used evidentially. The Commission has apparently reached a similar conclusion, for it has made some semi-official experiments and for some months has had under consideration the amending of its rules of practice and procedure to provide for the exchange of exhibits between counsel at least ten days prior to the date of the hearing at which such exhibits are to be offered in evidence; the purpose of the proposed amendment, it is said, is to expedite the trial of proceedings before the Commission, by enabling counsel to make more effective preparation for the cross-examination of the witnesses who offer the exhibits on the date of the hearing.

While the adoption of the proposed amendment would no doubt mark an improvement over present conditions, it may yet be insufficient to achieve its main purpose of narrowing the area of conflict and thus shortening the course of hearings. The mere exchange of exhibits may better prepare counsel to cross-examine witnesses, but still may fail to expedite formal proceedings, because the respective parties will have prepared their cases and their exhibits without

reference to those of their opponents.[61] This difficulty might be avoided if the party bearing the burden of procedure were first to submit the records, accounts, and other exhibits which pertain to its case; thereafter, the similar material relied on by the other interests in the proceeding might be submitted in the same way, leaving open the possibility of further presentation of rebutting material. An exchange of proofs in this manner might constitute a large step toward reducing time-consuming testimony on points which might well be eliminated from the controversy by disclosures made in advance of the formal hearings. The documentary material would, of course, become embodied in the record, subject to rebuttal and explanation when desired. In many instances, indeed, even some of the documentary material could be displaced by stipulation. It is a fact that few rate cases turn upon resolution of conflicts in reported observations of witnesses or upon disputes concerning "primary facts." Rather, they ordinarily revolve about the conclusions to be drawn from the essentially undisputed data or about the relevancy of data the accuracy of which is not in controversy. These attributes of rate hearings set them

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61. This very circumstance might create a procedural burden, since after the parties have had opportunity to examine their opponents' exhibits, they might very probably wish to offer added material of their own and could be compelled to ask the Commission's leave to file papers out of time. Consideration of such motions might be an onerous and unprofitable addition to the Commission's work.

apart from many other types of formal proceedings, and warrant extensive experimentation with pre-hearing conferences and other devices which can reduce unnecessary delay in establishing the factual situation.[62] Standing in the way of immediate improvement at the Commission is its apparently bitter antipathy toward stipulations. So long as the present hostility remains, efforts to define the critical issues by agreement, by exchange of data, and by concessions must necessarily proceed at a slow pace - if at all.

Filing schedules under rate orders. Schedules filed in compliance with rate orders entered after formal proceedings are referred to the Division of Rates for consideration and report to the Commission. The necessity for these further steps of filing and Commission consideration flows from the fact that the Commission's orders do not always prescribe a precise schedule. They may do no more than contain findings as to the rate base and the permissible rate of return and then direct that the company file a schedule of rates and charges for the sale and delivery of electricity (or gas)

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62. That experimentation has proved useful in circumstances comparable to those of the Federal Power Commission is demonstrated by the successful utilization of pre-hearing conferences in the Civil Aeronautics Authority and of the "shortened procedure" in the Interstate Commerce Commission. See this Committee's Monographs No. and No. , which discuss those two agencies, respectively.

designed to yield annual gross revenues of a fixed amount on the basis of sales of an estimated volume.[63] Hence, considerable freedom of action remains to the company in fixing its rates and charges for particular items or services.

If the schedule satisfactorily effectuates the purposes of the order and the recommendation of the Division is approved by the Commission, the schedule is "filed" and becomes the lawful schedule of rates. In one case, however, when the schedule was unsatisfactory to the Commission, it was rejected for "filing" by formal order and the company was directed to comply with the rate order forthwith. The action by the Commission resulted in compliance. If the command had been disobeyed, the Commission would have been compelled to have recourse to the courts to secure an order that the company comply with the Commission's direction.

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63. The order may also, if the problem has been present, order the abolition of undue discrimination in rates.

Altering rates established by order of the Commission.

The Commission is now confronted for the first time with the question of how to require a utility to proceed in order to secure a change in rates established by order of the Commission. The staff has indicated that to change rates fixed by a Commission order, a power or gas company need only to file a new schedule supported by a statement of reasons not less than thirty days before the proposed effective date and that unless suspended by the Commission the schedule will automatically become effective. Whether the Commission will approve this procedure remains problematical.[64]

COMPLAINTS

Under the Power Act "any person, State, municipality, or State Commission complaining of anything done or omitted to be done by any licensee or public utility in contravention of (the Act) may apply to the Commission" for relief. The Natural Gas Act contains a provision substantially similar except that

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64. The ease with which a utility might, under the procedure indicated, vary the schedules ordered by the Commission is especially striking in view of the statutory provision that the Commission's order shall fix the rates "to be thereafter observed and in force." The procedure in this particular would differ sharply from that of some other federal rate-making bodies functioning under statutes with substantially similar provisions. See, e.g., this Committee's Monograph No. 11, "The Administration of the Packers and Stockyards Act", pp. 48, ff. and Appendix A. The procedure is justified on the ground that it is used generally by state utility commissions and that it works well in practice.

it does not authorize complaints by "persons".

The Commission's rules of practice provide for both informal and formal complaints. An informal complaint must be in writing, contain the name and address of the complainant, the name of the party against whom the complaint is directed and a brief statement of the basis of the complaint.

The Commission occupies the role of mediator in controversies commenced by informal complaint, except where the matter charged is serious enough to require the institution of a formal proceeding on the Commission's own motion. Correspondence and conferences are relied upon as the means of settlement and formal orders are not entered. If these methods fail to produce satisfactory results, the Commission may either suggest to the complainant that a formal complaint be filed or institute a formal proceeding on its own motion, or both.

The Commission receives a number of informal complaints each year which are either palpably frivolous or clearly outside the Commission's jurisdiction. They are first sent to the bureau which seems appropriate in the judgment of the mail dispatcher. That bureau may pass the matter along to another if the complaint seems to come more nearly within the other's field of activities. When it appears to be clear that no formal action should be taken the bureau in which the complaint comes to rest prepares a letter for the Secretary's signature outlining in a general way the reasons why it is believed that the Commission should not act. When the letter reaches the

Secretary he may consult other members of the staff and perhaps obtain advice from the Bureau of Law before signing. If the reason assigned for not acting is that the matter is beyond the jurisdiction of the Commission, a copy of the pertinent statute may be enclosed with the letter, and if, in addition, a state commission has jurisdiction, it will be suggested that the complaint be referred to it.

Formal Complaints. Formal complaints must be typed or printed on paper of a prescribed size and be signed and verified by the complainant or his attorney. Enough copies to permit the service of one on each defendant and still leave five for the use of the Commission must be filed. Provision is made in the rules of practice for joinder of actions and parties. Supplemental and amended formal complaints may be filed only by leave of the Commission. So far as can be ascertained the Commission has never been called upon to dispose of a formal complaint which was clearly frivolous or obviously not within the Commission's jurisdiction.

When formal complaints are received, the Secretary serves a copy on each defendant by registered mail and notifies him that under the Commission's rules of practice, a verified answer must be filed within thirty days of the service of the complaint. One copy is referred to each of the three Bureaus and the Secretary sends one to the Chairman for the appointment of a supervising commissioner. The Secretary suggests the appointment of supervising commissioners in rotation unless the

subject matter of the complaint deals with a case which a particular commissioner has handled before, or is customarily assigned to only one commissioner in which event that commissioner's name is suggested. The Chairman makes the formal designation and the Secretary notifies the Bureaus of the appointment.

The answer may either show satisfaction of the complaint or present a defense on the merits.[65] The answer is (like almost everything else in the Commission) referred to the Bureau of Law. If it pleads that the matters complained of have been rectified, confirmation is requested of the complainant if it has not already been given. If defense is pleaded, a copy is sent to the complainant and a recommendation that a hearing be held is submitted to the Commission. The Commission enters an order for hearing and fixes the time and place to suit the convenience of the parties when it is reasonably convenient to do so. If the matter is serious, the Commission may initiate a proceeding on its own motion and, in some instances, consolidate the two for hearing. There is a very definite trend toward this form of procedure in all cases, because the Commission has found that even states and state commissions are unable, for one reason or another, to operate as effectively as the

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65. According to available information there has never been a default. Under the rules failure to file an answer does not constitute an admission of the allegations of the complaint, but is, on the contrary treated as a general denial.

Commission's own staff in presenting at the hearing the raw materials for decision. So strong is this trend that proceedings are now extremely infrequently concluded merely on the basis of the complaint and answer. Discarding the role of "disinterested judge" who decides only such controversies as the parties may bring before him, the Commission has assumed the more exacting responsibility of analyzing each case to determine whether the public interest requires it to become an active participant in it. Thus, if the complainant would have difficulty in proving his case, even though his claim were meritorious, the Commission may enter the picture with a proceeding on its own motion. The attitude of the Commission in this respect is well illustrated by its opinion in Jaspan v. Philadelphia Electric Co.,[66] in which an individual complainant had asserted that an undue burden was cast upon domestic consumers of power by reason of below-cost sales to a large industrial consumer. Eventually the Commission determined that the complaint was not well founded, and hence refused to give the relief prayed for; but, significantly, before dismissing the complaint the Commission conducted an independent investigation into the facts, for it "recognizes the fact that it is manifestly impossible for an individual complainant to make out a prima facie case in a rate controversy such as that pending before the Commission in this proceeding. An individual

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66. Docket No. IT-5461, Opinion No. 35, December 3, 1938.

complainant seldom, if ever, has the necessary funds to finance the investigation and prosecution of such a case. When it can be demonstrated by the complainant, or the Commission finds, as the result of a preliminary investigation, that there is reasonable justification or probable cause for the complaint and that the public interest will be served by prosecuting the necessary inquiry and investigation into the matters complained of, then the Commission will take all necessary action to determine and assemble relevant facts and information that may be required to enable it to consider and decide the issues presented by the complaint . . . Data and information submitted of record in this case by the complainant do not furnish a full and complete basis for determining the cost to Philadelphia Electric Company of supplying electric energy to Delaware Power & Light Company, but the Commission has inquired into the relevant facts and information necessary to determine such cost through independent investigations conducted by its own engineers and accountants."

Certificates of Public Convenience and Necessity Under the Natural Gas Act.

Section 7(c) of the Natural Gas Act provides that "No natural-gas company shall undertake the construction or extension of any facilities for the transportation of natural gas to a market in which natural gas is already being served by another natural-gas company, or acquire or operate any such facilities or extensions thereof, or engage in transportation by means of

any new or additional facilities, or sell natural gas in any such market, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such new construction or operation of any such facilities or extensions thereof . . ." The statute requires the Commission to set all applications for hearing and to give notice to such interested persons as in its judgment "may be necessary."[67]

The form and content of applications for certificates have not been prescribed by the Commission. It is enough that the application be in writing, set forth facts sufficient "to enable the Commission to ascertain the matters to be determined under the provisions" of the Act, and be verified by an executive officer of the applicant having knowledge of the facts.

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67. Since the Natural Gas Act became law in 1938, five applications for certificates of public convenience and necessity have been filed, three have been granted, one denied, and one withdrawn.

The Commission has received a number of applications for leave to intervene in proceedings of this type from coal producers, shippers and dealers, from the Bituminous Coal Commission (and its successor, the Bituminous Coal Division), miners, competitors, and in at least one instance from another natural-gas company which had applied for a certificate to enter a part of the same market. Full intervention has been denied to all but gas companies competing in or seeking to enter the same market, and state commissions, on the theory that the others had no standing under the law and the Commission would represent them as members of the public. The privilege of participating to the extent of introducing evidence, filing briefs, and presenting argument has, however, been freely granted to those filing timely petitions if they could show some substantial interest in the case.

When an application is received, notice of its filing is issued to interested state commissions and to the competing company, a press release is issued, and copies are sent to Senators and Congressmen who come from affected states. The application is referred to the Bureau of Engineering for examination. When its study of the factual situation is completed, a memorandum for the Commission is prepared and is sent with the application to the Bureau of Law. That bureau prepares a proposed order for hearing and a memorandum discussing legal questions which appear to be involved. The Commission invariably orders a hearing (because the statute requires it to do so) and notice is given as in licensing cases.[68]

The notice of hearing merely fixes the time and place of the hearing and does not define issues. At the hearing the applicant is required to assume the burden of procedure by opening the evidence and, of course, it can do no more than seek to amplify its application by attempting to show public demand for its services and gas rates in the community to be served will be reduced. Obviously the position of the applicant is not advantageous, since it has nothing to guide it but the vague term "public interest" (which the Power Commission has not yet colored or explained by any great number of rulings) and the declared statutory policy that "the lowest possible reasonable rate consistent with the maintenance of adequate service" is to be desired.

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68. Supra, p. 27. The hearings themselves and the post-hearing procedure do not depart from the general pattern described infra, pp. 84, 88.

The order of proof as between interveners and the Commission is not established by rule of practice and the order followed is that dictated by the convenience of the parties.[69]

The value of hearings in the absence of protest or contemplated denial is open to question. It is said by some commission attorneys that the hearings afford a useful opportunity to cross-examine representatives of the applicant to elicit information not contained in or contradictory of the prepared statements which have been filed with the application.

The Natural Gas Act does not provide expressly that the Commission may revoke or cancel a certificate once issued, or impose limitations upon its life or conditions upon the exercise of the privileges which it confers. But one of the certificates granted raises some interesting questions in those respects. The Commission has provided in the certificate that it "shall be cancellable if applicant increases or proposes to increase the rate to the consumers proposed to be served above ten (10) cents per M.c.f."; that the certificate "shall be limited to and be in force and effect only for a period of ten years"; and that "a violation of any of the terms or conditions" of the certificate shall render it null and void.[70]

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69. Some state commissions have participated in hearings to the extent of sending "observers" and afterwards submitting "advisory opinions" to the Commission. It is difficult, if not impossible, to weigh the value or the influence of this form of participation.

70. Matter of Louisiana-Nevada Transit Co., Docket No. G-122, authorized July 18, 1939.

Interlocking Directorates

Section 305(b) of the Federal Power Act makes it unlawful for any person to hold the position of officer or director of more than one public utility as defined in the Act; or to hold the position of officer or director of a public utility and the position of officer or director of any bank, trust company, banking association, or firm that is authorized by law to underwrite or participate in the marketing of securities of a public utility, or officer or director of any company supplying electrical equipment to such public utility, unless the holding of such positions has been authorized by order of the Commission upon a showing that neither public nor private interests will be adversely affected. The Commission's rules require the filing of applications for authority to hold interlocking positions within thirty days after election or appointment, and they permit applications to be filed in anticipation. The contents of the application are prescribed in detail by the rules of the Commission.

Applications must be filed in triplicate. When received, one copy is sent to the Bureau of Engineering, one to the Bureau of Law, and one to the files. The Bureau of Engineering notifies interested state utility commissions,[71] makes

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71. Protests are rather frequently received, but they are seldom deemed meritorious. For example, it is said that the North Dakota Commission invariably protests as a matter of policy against granting authority to anyone but a North Dakotan to take part in the management of a utility operating there. Protests of this character are reputedly ignored entirely, on the ground that the stated basis of objection is irrelevant under the statute.

an analysis of the information contained in the application, checks information in the Commission's files and in service publications such as Moody's Manual, and then prepares a memorandum for the Commission which is sent to the Bureau of Law. The attorney assigned to the matter examines the application to see that the Commission has jurisdiction and in turn prepares a memorandum and a proposed order for the Commission, which he delivers with the memorandum of the Bureau of Engineering and the application itself to one of the commissioners who customarily supervises such matters. That commissioner considers the matter, sometimes prepares a memorandum of his own, and submits the application for action by the Commission. The Commission may (1) dismiss for want of jurisdiction; (2) grant the application; (3) order a hearing on the application; or (4) initiate an inquiry into all the interlocking offices and directorates in the public utility involved.

Determining jurisdiction. Frequently questions of jurisdiction are raised by an application. There may, for example, be uncertainty whether a particular company is a public utility within the meaning of the Act. Rather than chance a violation of the law persons holding offices in business organizations of doubtful status file applications in which the jurisdictional facts are denied or the question of jurisdiction is reserved. Thus in effect they seek advisory opinions.[72] In

72. While the Act makes no provision for the Commission's receiving or acting upon applications in which (continued)

cases in which want of jurisdiction is satisfactorily established, the Commission dismisses the application without approaching the merits. In debatable cases a hearing on the application is usually ordered and in some instances, when the jurisdictional question is close, a separate hearing on that point alone is ordered.

Hearings may be marked by the intervention of the power company to oppose a determination by the Commission that jurisdiction exists. Since the issue involved may be whether interstate transmission ends at one end of a transformer or the other, or of similar nature, the questions are frequently difficult to solve. When the jurisdictional facts are put in issue, the Commission assumes the burden of proceeding with the introduction of evidence bearing on that point; but the applicant is required to go forward on the merits of the application.

The usual hearing and post-hearing procedures are followed, except that when jurisdiction is not questioned, the Commission's counsel does not file a brief and usually no brief is filed on behalf of the applicant. Thus at no point in the proceeding is the applicant ever advised of the questions to be considered other than the general one of whether "public or private interests will be adversely affected." It is said that

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(continued) jurisdiction is denied, the Commission regards its present procedures as well adapted to further the public interest, and therefore forbears from dismissing applications of this character.

prehearing conference between counsel for the applicant and the Commission indicates clearly the purpose of the inquiry; but, of course, that does not show in the record and it may be doubted that the expense of a conference in Washington should be necessitated in every case in order to ascertain the points concerning which the Commission desires further information. Statistics would indicate that the problem is of no consequence, since only once has the Commission withheld its approval; but the statistics are useless if not deceptive, for in the very great majority of cases in which the Commission has ordered a hearing on an application or an inquiry into a system, not limited to the question of jurisdiction, resignations from office have followed forthwith. Whether the hundreds of resignations in these circumstances are induced by fear that improper activities will be uncovered or by the feeling that the directorship or office is not worth submitting to an exploratory hearing cannot, of course, be determined.

Disposition by the Commission. The Commission's orders permitting the holding of the interlocking positions simply recite the finding of jurisdiction and that neither public nor private interests will be adversely affected. They authorize the applicant to hold specified offices until otherwise ordered by the Commission, but expressly reserve the right to require a further showing by the applicant at any time. The regulations extend the effect of the orders to immediately succeeding terms of office, but provide that if the tenure in

office is interrupted, further authorization by the Commission is required before the position may be resumed.

In the single case in which authority was refused the Commission made specific findings that the applicant had held office in several utilities subject to the jurisdiction of the Commission and been in charge of their accounts; that the accounts had not been kept in accordance with the uniform system prescribed by the Commission; that the applicant had been provided with an inordinately large expense account which contained a number of items of an unusual nature, not satisfactorily explained; and finally that it had not been shown that public and private interests would not be adversely affected if authority were to be granted.

When resignations are submitted, the Commission terminates the proceeding by formal order containing a simple finding that the applicant no longer requires authorization from the Commission.

In case jurisdiction is not established, the Commission makes findings that the jurisdictional facts do not then exist and thereupon dismisses the application.

Failure to seek authorization. Failure to seek authorization from the Commission presents no problem. From time to time the staff of the Commission learns of the unauthorized holding of interlocking positions, but a letter or other notice almost invariably brings either an application or a resignation. The only possible basis of dispute is jurisdiction over

the utility or the nature of the other business organization. The first is usually settled in some other proceeding - such as a rate case - the second is usually rather easily determined without formal proceedings.

Exportation of Power and Exportation and Importation of Gas

The Power Act forbids the exportation of electric energy without authorization from the Commission, and the Natural Gas Act contains similar provisions dealing with both the exportation and importation of natural gas. Moreover, by Executive Order 8202, dated July 13, 1939, the President "authorized and requested" the Commission to receive applications for permits for the construction, operation or maintenance of facilities for the exportation of power, or the exportation or importation of natural gas, and, after obtaining the recommendations of the Secretary of State and the Secretary of War, to submit each such application to the President with a recommendation as to whether the permit applied for should be granted and, if so, upon what terms and conditions. Since trade without facilities is impossible and facilities without trade are useless, authorization from both the President and the Commission must be obtained for one is valueless without the other.

Applications for Presidential permits are referred to the Bureau of Engineering for study, and the Secretary of State and the Secretary of War are supplied with copies and asked to make recommendations. Replies received from the two Secretaries are transmitted to the Bureau of Law, which also receives the results of the study of the Bureau of Engineering. In the Bureau of Law proposed orders and a draft of a permit are prepared for submission to the Commission.

If the Commission approves the application, the Bureau of Law prepares a letter to the President summarizing the recommendations which have been made, which is signed by the Chairman when it meets with his approval. The procedure to be followed in case the President declines to issue a permit in accordance with the Commission's recommendations has not been definitely determined.[73]

Applications for permission to export or import are referred to the Bureaus of Law and Engineering. The Bureau of Engineering prepares a report which is sent to the Commission through the Bureau of Law. The Bureau of Law prepares a proposed order granting permission or setting the application for hearing if reason to refuse permission appears or reason to grant is not made compellingly clear.

The basis upon which an application may be disapproved is, once more, the vague and shifting concept of the "public interest." Content has been given the phrase by the Commission's past determinations, which have rested denial of applications on economic factors, such as that exportation of power would dangerously diminish the supply available for domestic uses, or would cause increased local prices. The standard remains, however, a general one. Notwithstanding this fact, the Commission has done nothing to particularize the issues, by indicating the factors in which it is

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73. As yet no Presidential permits have been either granted or denied but a number of applications are pending before the Commission.

especially interested, in cases which go to hearing. These include every application for leave to export power where the Commission is not fully satisfied that the application should be granted, and every application involving importation or exportation of gas, whether or not the Commission is favorably disposed.[74] When hearings are held, the applicant must proceed by the Commission's standardized hearing methods (infra, pp. 84 ff.) to establish that his desire to export or import will not disserve the public interest - and he is wholly unaided by advices from the Commission which would enable him to canalize his efforts or to produce the information most earnestly desired by those who must determine the action to be taken finally.

Merger, Disposition of Facilities, Purchase of Securities

The Power Act forbids any public utility to sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any portion having a value in excess of $50,000, or to merge or consolidate its facilities with those of any other person, or to acquire any security of any other public utility without authorization from the Commission. The form and contents of an application for authorization are prescribed

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74. The reason for scheduling a hearing in every gas case is not clear. The statute does not so require, and the issues are not essentially different from those which arise in power cases and are favorably decided without hearing.

in detail by the Commission's rules of practice, which also contain a warning that Commission action will require about 45 days. The Act requires the Commission to "give reasonable notice in writing to the Governor and State Commission of each of the States in which the physical property affected, or any part thereof, is situated, and to such other persons as it may deem advisable." The Commission's rules provide that an applicant may be required to give such local notice by publication as the Commission may prescribe.

When applications are received, form notices are prepared in the Secretary's office and sent with a copy of the application to the Bureau of Law. Another copy of the application is sent to the Chairman, a third to the Bureau of Accounts, Finance and Rates and, except in the case of applications for authority to purchase securities, a fourth is sent to the Bureau of Engineering. An attorney in the Bureau of Law checks the notices and the press release prepared by the Division of Information, initials them and returns them to the Secretary's office. The notice is published in the Federal Register and copies of the press release are mailed to the governor and appropriate commissions of each interested state. The Chairman designates a supervising commissioner, and the Secretary notifies the Bureaus of the designation.

The Bureau of Accounts, Finance and Rates, and the Bureau of Engineering report to the Commission by

memorandum sent directly to the supervising commissioner instead of through the Bureau of Law as is usually done. A copy of each memorandum is sent to the Bureau of Law and, if both are favorable to the applicant and the Bureau of Law has found no reason for denying the application, the attorney prepares an appropriate order which he submits to the supervising commissioner. The supervising commissioner presents the matter to the Commission for action. If any of the Bureaus reports that the application is objectionable, incomplete or otherwise not grantable on its face, a hearing is recommended.

The hearing is ordered[75] and notice is given as in other cases, before the Commission, but in some cases there is a semi-official specification of issues in a letter prepared by the attorney in charge of the case, which is signed by the Secretary and sent to the applicant with the notice. The letter simply states that the Commission is interested in developing facts about some point or points in the application and does not purport to limit the scope of the Commission's inquiry. At the hearing the applicant is required to open and counsel for the Commission cross-examines. The hearing and post-hearing procedure follow the usual plan except that usually briefs are not filed because time limitations will not permit their use.

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75. Sometimes hearing is waived at the time the application is filed, and in one case the Commission denied an application without hearing in reliance upon such a waiver.

Issuance of securities by public utilities. The Power Act provides that no public utility except those whose security issues are subject to regulation by state commissions, and those subject to the Public Utility Holding Company Act of 1935 and not exempted by the Securities and Exchange Commission,[76] shall issue any security or assume any obligation or liability in respect of any security of another person without authority from the Commission.[77] The Act also provides that authority shall be granted only if the Commission finds that the proposed action "is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility and which will not impair its ability to perform that service, and (b) is reasonably necessary or appropriate for such purposes." The rules of the

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76. These exceptions leave very few security issues subject to the jurisdiction of the Commission.

77. This prohibition does not apply to the issue or renewal of, or assumption of liability on, a note or draft maturing not more than one year after the date of such issue, renewal, or assumption of liability, and aggregating (together with all other then outstanding notes and drafts of a maturity of one year or less on which such public utility is primarily or secondarily liable) not more than five per centum of the par value of the other securities of the public utility then outstanding. In the case of securities having no par value the fair value as of the date of issue is the determining factor. In the excepted cases, however, the statute requires the utility to report its transaction to the Commission within ten days. Such reports are examined by the Bureau of Accounts, Finance and Rates and filed without reference to the Commission.

Commission prescribe the form and content of applications for authority and state that Commission action will ordinarily require about 30 days.

Applications for approval of security issues receive special attention because of the great need for speedy disposition. Thus, even in moving from the Docket Section to the Bureau of Law they are dispatched by special messenger rather than by routine messenger service. Notice of filing is given as in merger cases, a supervising commissioner is designated, the Bureaus of Law and Accounts, Finance and Rates launch their studies at once, and every effort is made to complete the matter at the earliest possible moment. The report of the Bureau of Accounts, Finance and Rates is submitted to the supervising commissioner, and a copy is sent to the Bureau of Law.

In some cases when the Bureau of Accounts, Finance and Rates has recommended approval of the issue, the supervising commissioner has called the attorney assigned to the case and, on his oral statement that no legal objection was apparent, submitted the matter to the Commission as soon as an appropriate order could be drafted in the Bureau of Law. Conferences with Commission officials other than commissioners, before the application is filed, contribute greatly to expeditious handling of these matters by assuring the filing of full and complete applications and permitting explanations before misunderstandings arise.

When an application is not sufficient on its face to justify approval, a hearing is ordered at once and notice given, sometimes supplemented by telegraph to give the parties a better opportunity to prepare.[78] The need for speed is said to justify the practice of holding hearings rather than resorting to correspondence, since the applicant's representatives can appear at a hearing, and present their case more quickly than could be done by correspondence. The order for hearing is very general in its terms lest the specification of an issue unduly jeopardize the salability of the securities. The record is not formally closed, but instead the hearing is "adjourned" to be reconvened on 24 hours' notice in order to keep the way clear for further speedy hearing if it becomes necessary upon submission of the underwriter's commitment and closing price. The examiner's report is prepared as quickly as possible and submitted to the supervising commissioner, who instructs the Bureau of Law to prepare an appropriate order in accordance with his views. As soon as the order is ready, the case is submitted to the Commission for action.

When the action of the Commission is unfavorable to the applicant, but there seems to be merit to the general plan

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78. The published notice that an application has been filed indicates that protests against granting the application may be filed within ten days after notice. If any protests were received or, indeed, if the Commission had any intimation, however informal, that an individual or group was interested in the subject matter of the application, it is said that telegraphic notice of hearing would be communicated to each protestant or other interested party as well as to the applicant.

while only details prevent approval, the supervising commissioner may undertake to advise the applicant as to changes which will probably lead to approval. Great care is taken to make it plain that the supervising commissioner is speaking only for himself and not for the Commission; but, of course, the supervising commissioner is aware of the Commission's policies and his advice may be relied upon with a considerable degree of safety.

The limitations upon the Commission's jurisdiction lead to some difficult questions. The line between the jurisdiction of the Power Commission and that of the Securities and Exchange Commission is shadowy and not yet settled. Cases have arisen which fell in the doubtful zone and the Commissions resorted to conferences in an effort to settle them. The individual cases were settled, but without the establishment of any satisfactory rule of decision. These jurisdictional questions have led to the development of a very interesting, nonstatutory procedural device: In one recent case the Commission permitted a utility company which desired to undertake a financing operation, but was uncertain whether it was subject to the Power Commission's control in this respect, to file a petition for a "declaratory judgment" by the Commission that it lacked jurisdiction.[79] The petition

79. "Declaratory judgment" is perhaps something of a misnomer, for legally the Commission would not be bound by its determination in the event that it later desired to alter it. But as a practical matter, the disclaimer of jurisdiction by the Commission in these circumstances would no doubt be final and binding, for there would be no incentive to withdraw the disclaimer once it had been made.

was a formal document which alleged the facts which bore on the jurisdictional dispute; consideration was entirely internal and no hearing was held. A highly formal order was entered at the end, reciting the Commission's conclusion that it had jurisdiction.

Subpoenas

Until November 3, 1939, the Commission reserved to itself the exclusive right to issue all subpoenas. At that time the power to issue subpoenas to appear and testify was delegated to examiners and others who might be designated by the Chairman to conduct public hearings; but the Commission still required that a request be made to it for findings of relevancy and materiality before subpoenas duces tecum can be issued. While this requirement seems to be somewhat cumbersome, it has been deemed in some quarters to be necessitated by sections 307(b) of the Power Act and 14(c) of the Natural Gas Act, which authorize the Commission to "require the production of books, papers, correspondence, memoranda, contracts, agreements, or other records which the Commission finds relevant or material to the inquiry."[80] But the awkwardness of the procedure is relieved by the fact that

80. It is at least arguable that the statutory language need not be interpreted absolutely literally, as requiring that the Commissioners themselves find relevancy and materiality. Other similarly worded statutes have been interpreted as permitting sub-delegation of the authority to make the requisite findings and to issue subpoenas accordingly.

subpoenas are rarely needed. Applicants and respondents in Commission proceedings of course have access to their own documentary material and require little else. Such requests for subpoenas as there have been have come chiefly from the Commission's staff. Usually the need for subpoenas can be foreseen, and in those cases the Commission makes a finding in advance, sufficiently broad to cover any situtation likely to arise. In some cases when the Commission is entering upon an investigation in the field, a number of blank subpoenas ad testificandum but not duces tecum will be executed and delivered to the attorney in charge of the investigation to be used in his discretion.

Intervention

The right to intervene in proceedings before the Commission is sought to a considerable extent. The Commission may permit full intervention with all the privileges and rights of a party, or it may grant the right to participate merely to the extent of introducing relevant and material evidence, presenting argument and filing briefs, or it may limit the applicant to an appearance as amicus curiae.

Application for leave to intervene may be made by petition of any interested state, state commission, municipality, a representative of interested consumers or security holders, or any competitor of a party to a pending proceeding, or any other person whose participation may be in the public interest.

A petition must be filed not less than five days preceding the date set for public hearing unless the Commission otherwise orders. The petition must set forth the grounds of the intervention, the position and interest of the petitioner in the proceedings, and must be subscribed and verified. When received, petitions for leave to intervene are referred to the Bureau of Law, which prepares a recommendation to the Commission and a proposed order. The Bureau of Law is well aware that the Commission follows a very liberal policy in permitting intervention and it seldom recommends denial unless very strong reasons can be advanced in support of the recommendation. Where, however, the effects of a determination will not directly fall upon the would-be intervener, a tendency has been manifested of seeking to limit intervention to the Commission proceedings themselves; that is, the intervener is given leave to participate fully in the administrative proceeding, but is not formally given the status of a party, so that the intervener's standing to seek judicial review of the final order is not clear. The effectiveness of this effort to narrow the number of possible appellants, by attaching conditions to the grant of leave to intervene, has not yet been judicially determined.

HEARINGS

The Examiner and his powers.[81] The examiners who preside at the Commission's hearings are drawn from the Examiners Division, headed by a Chief Examiner and responsible directly to the Commission.[82] All members of the examining staff are lawyers, a circumstance which is apparently not wholly advantageous. The Chief Examiner expresses the conviction that the lawyers on his staff should be joined by colleagues with engineering and accounting training to assist in the solution of problems for whose full understanding legal learning is not enough.[83]

The powers of the Commission's examiners are comparatively narrow. They may rule on motions which are not dispositive, and may decide questions of evidence. They have power to adjourn hearings. They may submit crucial questions to the Commission before the completion of the hearings.[84] Since November 3, 1939,

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81. For method of designating an examiner to sit in a particular case, see supra, p.17.

82. So strenuous an effort is made to insulate them from possible influence by other members of the staff that when the General Counsel requested that he be supplied with copies of routine daily reports of the progress of hearings which examiners submit to the Chief Examiner, his request was flatly refused and he was advised to obtain his copies from the Secretary, who receives the reports from the Chief Examiner for docketing and submission to the Commission.

83. As is shown infra, p. 88 , the present absence of engineers and accountants on the examining staff necessitates post-hearing consultation between the examiners and men of those professions employed in the Bureau of Engineering or the Bureau of Accounts, Finance and Rat

84. But since the Commission rarely entertains this type of interlocutory appeal, the power is very seldom exercised.

they have been empowered to issue subpoenas ad testificandum and, when the Commission has formally found that the documents to be produced are relevant or material, subpoenas duces tecum. They may fix the time for filing briefs after the hearing, but they may not extend the time without the approval of the Chief Examiner and the supervising commissioner. They are expected to -- and often do -- take an active part in questioning witnesses when necessary to clarify or complete the record.

The process of proof. The procedure at hearings is of a strictly formal character, conducted in a highly dignified manner no matter how ill-adapted one might believe courtroom methods to be when applied to the task at hand.[85]

The examiner literally calls the hearing to order, for he has specific instructions that "the use of such expressions as 'The hearing will now be resumed' as a substitute for simply calling the assemblage to order is not favored." The examiner's next act is to read the order of the Commission setting the matter for hearing. The appearances of the parties and their counsel are noted for the record. The hearing then proceeds in the usual courtroom manner, with opening statements and preliminary motions followed by the introduction of evidence by the party having the burden of going forward with the presentation of proofs.

85. Despite the "judiciality" of Commission hearings, they have in the past been heavily attended by Senators or Congressmen who desired to be heard on the issues concerning which evidence was to be received. On occasion a hearing has been interrupted to permit them to speak and they have made statements which contributed little or nothing to the decision of the matter before the Commission and might have been addressed more appropriately to a legislative body. Although there has been no apparent effort on the part of the Commission to discourage it, the practice seems now to be dormant, if not dead.

Both the Power Act and the Natural Gas Act provide that the technical common-law rules of evidence shall not bind the Commission. While there is no studied effort to apply these rules, departures from them are not striking. The best evidence rule is not strictly followed, nor is the parol evidence rule and some others of the exclusionary doctrines. In the main, however, one feels after examining a number of records in Commission cases that little is admitted which does not measure up to fairly stringent tests of relevancy, materiality, and probative (persuasive) quality, so that at least the basic purposes of the common-law rules are served. Affidavits and other statements which cannot be tested by cross-examination are seldom and reluctantly admitted, and then only when it is plain that the evidence is necessary to a complete record and cannot well be obtained otherwise. Provision for the taking of depositions is made in the rules of the Commission, but the use of depositions is rare.

Frequently in the more complicated cases before the Commission the hearings are adjourned at the close of the evidence in chief of the party opening the hearing, so that the other parties may examine the evidence in the record, which is almost always in the form of voluminous reports, charts, and other documents and long technical opinions of expert witnesses.[86]

86. Compare the suggestion supra, p. 53 that the Commission should prescribe a pre-hearing exchange of exhibits.

Oral argument by the parties to the examiner is permitted only if a request is made before or at the hearing. When it occurs at all, it is usually heard immediately following the close of the evidence but in some cases argument has been heard after the filing of briefs. The examiner limits the time as he sees fit. The argument is reported with the testimony and submitted to the Commission for consideration in deciding the case. The privilege of oral argument is sought only infrequently, probably because the parties realize that the technical nature of the issues permits effective discussion only in writing.

Post-hearing procedure. Upon the closing of the record the examiner fixes the time for filing briefs and requests all parties to incorporate proposed findings in the briefs. The time for filing may vary widely, since the issues may number from one or two to an estimated fifty thousand. Briefs of the parties must be filed contemporaneously and parties may file reply briefs only if a main brief is filed. The merit of this practice is said to be a great saving in time, and so far as can be ascertained there is no complaint against it.

With the help of the briefs the examiner undertakes the preparation of his report. Often technical problems arise which the examiner feels require him to seek the aid of engineers or accountants. To procure that assistance he consults the Chief Examiner and explains his problem. The Chief Examiner selects a member of the staff of the appropriate Bureau who has had no connection with the case and requests the Bureau Chief to assign that staff member to assist the examiner. Consultation with those who have participated in the case is, it is asserted, not permitted in the absence of the "adverse party."

The examiner's report usually recites the authority for the hearing, his designation, and the appearances of counsel. It sets out a brief history of the proceedings before hearing, a jurisdictional statement, a statement of the questions presented, a summary of the evidence, findings, and recommendations. The report is edited by the Chief Examiner, but only, it is said, to point out flaws in reasoning and style, and not to change the

substance. The supervising commissioner may spur the examiner along in the completion of his report or insist upon its submission within a limited time, but he will not discuss the case with the examiner or attempt to influence the examiner in making findings or recommendations.

When the examiner's report is completed, it is submitted to the Commission with the briefs, the record, and the files.[87] It is never served upon the parties and therefore there are no exceptions to it. Indeed, there are intimations that the examiner's report is rarely accorded very great weight by the Commission.[88] The supervising commissioner who has kept in touch with the case usually prepares a memorandum for the other commissioners commenting on the examiner's report and recommendation. Each Commissioner makes some study of the record and it is said that in every case at least one Commissioner reads the entire record. The Commission does not consult staff members to obtain facts not in the record but it frequently calls those who have participated in a case and

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87. Occasionally the Commission has proceeded to decision without waiting for the examiner's report.

The files which go to the Commission contain the original applications and exhibits which instituted the matter that has been heard; they contain, too, staff reports and outside correspondence (including, perhaps, protests) concerning the problems at issue. Some of this material may be evidential in character, though not formally introduced into the record.

88. As is apparent from the subject matter of most Commission cases, demeanor evidence does not assume major importance as a means of arriving at an accurate perception of the facts. And, as already noted, many of the issues call for engineering or accounting skills, rather than the lawyer's.

questions them as to points in the record.[89] Finally a vote is cast and the decision is made. The formal order may be drafted by one or more of the Commissioners or by the Bureau of Law and then revised by the joint action of the Commissioners. Decisions are seldom supported by argumentative opinions; only 51 opinions of the Commission have been written since the creation of the Commission of five in 1930. Staff members generally feel that if the Commission wrote more opinions the staff work would proceed more efficiently, for the general language of the statutes would then be reinforced by authoritative, or at least suggestive, interpretations. In justification of the practice of not writing opinions it is said that (1) the volume of business would not permit the writing of opinions in all cases; (2) opinions in all cases would not be helpful; (3) the Commission is not bound by the doctrine of stare decisis; (4) only infrequently do cases rest on similar factual bases; and (5) the supervising commissioner knows the Commission's policies and is able to guide the staff in policy matters.

Rehearing. Under both the Power Act and the Gas Act application for rehearing is a prerequisite to judicial review of any order of the Commission. "Any person, State, municipality or

89. Statement of this distinction is not easy. A number of staff members, separately interviewed, were unanimous in asserting that, when called before the Commission, they have never been asked or given opportunity to supply material not already in the record, or to make argument not already formally presented. At the same time, these staff members say that they have been asked to explain exhibits which appeared in the record, or to clarify ambiguities of language, or to indicate more clearly the theory upon which their analysis proceeded.

State Commission aggrieved by an order of the Commission in a proceeding . . . to which such person, State, municipality or State Commission is a party" may apply for rehearing within 30 days of the issuance of the order. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, the application is to be deemed denied.[90] The Commission's rules require applications for rehearing to be made by petition, under oath, stating specifically the grounds relied upon; they must be served by the petitioner upon all parties to the proceedings or their attorneys of record. Alleged errors must be specified with particularity.

Applications for rehearing are referred to the attorney in the Bureau of Law who appeared for the Commission. He submits a memorandum stating his views to the Commission, but the applicant is not served with a copy. On occasion the Commission has requested the views of the examiner or other officials to be submitted either orally or in memoranda.

The Commission's order, of course, varies in form according to the action taken, and may deny the petition, modify the order attacked, or reopen the proceeding. While a statistical record is not obtainable, it is said that a petition for rehearing is filed almost as a matter of course in nearly every case decided adversely by the Commission - and that the Commission almost never grants such a petition.

90. In view of this provision of the statutes, applications for rehearing are filed as a matter of course in contested proceedings of any consequence. An unsuccessful attempt has been made to obtain a review of the Commission's findings on a declaration of intention by appealing from an order denying rehearing. Carolina Aluminum Co. v. Federal Power Commission, 97 F. (2d) 435 (C.C.A. 4th, 1938).

JUDICIAL REVIEW

The Power Act[91] and the Gas Act[92] contain precisely similar provisions for judicial review of the Commission's orders. Any party to a proceeding aggrieved by an order of the Commission may obtain a review by the Circuit Court of Appeals for any circuit wherein the licensee, public utility or natural gas company to which the order relates is located or has its principal place of business, or by the Court of Appeals for the District of Columbia by filing with the court, within sixty days after the order of the Commission upon the application for rehearing, a petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of the petition must be served upon a member of the Commission. After service the Secretary with the assistance of the Bureau of Law prepares a transcript of the record which is certified and filed with the court. No objection to the order may be considered by the court unless it was advanced in the application for rehearing or there was reasonable ground for failure to do so. Findings of fact by the Commission are conclusive if supported by substantial evidence but any party may, by leave of the court, adduce additional evidence before the Commission whereupon the Commission may modify its findings as to the facts and if it does so, the modified findings and the Commission's recommendation, if any, for the modification of the order must be filed with the court. The modified findings are conclusive if

91. Section 313(b)

92. Section 19(b)

supported by substantial evidence but the statutes do not explicitly require the court to accept the recommendation as to the order. Review by certiorari or certification to the Supreme Court is also provided.

ENFORCEMENT OF THE STATUTES, AND THE REGULATIONS AND ORDERS OF THE COMMISSION

To enforce the statutes or its regulations and orders the Commission must resort to the courts, Section 314 of the Power Act and Section 20 of the Gas Act provide:

> "(a) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this Act, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper District Court of the United States, the Supreme Court of the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this Act or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings under this Act.
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> "(b) Upon application of the Commission the district courts of the United States, the Supreme Court of the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this Act or any rule, regulation, or order of the Commission thereunder.
>
> "(c) The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interests in investigations made by it or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for or represent theCommission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission."

In addition Section 315(a) of the Power Act authorizes the Commission to impose a forfeiture of not more than $1000 upon any licensee or public utility for willful failure to comply with an order of the Commission, to file any report required under the Act, to submit information or documents required in the course of an investigation or to appear in response to a subpoena. The amount of the forfeiture may be recovered in a civil suit. The forfeiture provisions of the Act have never been formally invoked by the Commission but, no doubt, they have some value as deterrents.

RULE-MAKING

General regulations and rules of practice. Both the Federal Power Act and the Natural Gas Act authorize the Commission to adopt such rules and regulations as may be necessary to effectuate the purposes of the statutes. Rules of practice have been promulgated under both statutes.

The Commission has no fixed procedure for the formulation, consideration, or promulgation of rules and regulations. At times an inter-bureau committee appointed by the bureau chiefs has functioned, principally as a co-ordinating body; but any Bureau within the Commission or any Commissioner may recommend the adoption of a rule or regulation and, after receiving such wholly internal consideration as the Commission deems necessary, the proposal is accepted or rejected. Both the Power Act and the Gas Act provide that rules and regulations shall become effective thirty days after publication in such manner as the Commission may prescribe unless the Commission orders otherwise. When new rules and regulations are adopted they are published in the Federal Register, and copies are sent to all licensees, public utilities, or natural gas companies which may be affected. In addition, press releases are sent to newspapers, trade journals, and trade associations. So far as can be ascertained, the Commission has never felt it necessary to have hearings, conduct conferences, or circularize affected interests prior to promulgating rules. The total failure to utilize any systematic methods of tapping

the opinions of interested groups, except in the adoption of uniform systems of accounts, is ascribable, no doubt, to the limited scope of the rules adopted. They have either been rules of practice or prescriptions of information required to be filed with the Commission in connection with various applications, or annual reports. None has sought to regulate the actual conduct of the business operations of those to whom the rules extend.

Uniform system of accounts. The Commission has adopted two uniform systems of accounts - one for electric companies and one for natural gas companies. Prior to the adoption of each, the Bureau of Accounts made extensive studies of accounting systems required by state regulatory bodies and conferred with representatives of those bodies and with the National Association of Railroad and Utilities Commissioners. As a result of its studies, the Bureau formulated a proposed system which met with the tentative approval of the Commission. Public hearings were then ordered. Notice was given by mail, by press releases, and, in the case of the natural gas companies, by publication in the Federal Register.

The hearing on the system of accounts for the electric companies was somewhat in the nature of a convention or open forum. Round table conferences were held, at which the Commission was represented by some of its accountants and attorneys, and the power companies were similarly represented. Discussions were informal and statements were argumentative. The discussions were reported stenographically and considered by the Commission, which then adopted the uniform system originally proposed.

The hearing on the system proposed for the natural gas companies was held before the Commission sitting en banc, and all the rituals and ceremonies of an adversary judicial proceeding were followed. Both the Commission and the natural gas companies were represented by counsel, who offered the sworn testimony of witnesses, and formally introduced much documentary evidence. The hearing was opened by counsel for the Commission, who called on the chief of the Bureau of Accounts, Finance and Rates to explain the system. The representatives of the gas companies were permitted to cross-examine and then to introduce evidence of their own. The members of the Commission took an active part in questioning witnesses.

At the conclusion of the hearing the representatives of the gas companies filed briefs with the Commission, but the Commission Staff did not follow suit. The Commission adopted the system proposed with only one or two minor changes, and ordered that the uniform system be installed and kept after January 1, 1940.

The differences in the form of hearings held in these two instances were dictated by no variations in the respective subject matters. Nor was the formalized hearing on the proposed gas accounting system dictated by any dissatisfaction--either on the part of the Commission or of the electric companies--with the form of hearing on the proposed electric accounting system. The reason for the change in procedure appears to have been wholly a tactical one. At the time that it was scheduled there was

considerable clamor concerning administrative procedure in general and administrative rule-making in particular. Purely as a "public relations" matter it was determined to conduct a rule-making hearing which even the most pronounced proponent of formalism would pronounce acceptable. Now that the deed has been done, there appears to be no sentiment that the proceeding brought to light any information or opinions which could not have been obtained by much less wasteful and time-consuming methods.